No. 87-1104-CFH
Status: GRANTED

Title: Walter Zant, Warden, Petitioner
v.
William Neal Moore

Docketed:
December 23, 1987

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Boleyn,Susan V.

Counsel for respondent: Givelber,Daniel J., Boger,John Charles

Entry	Date	Note	Proceedings and Orders
1	Dec 23 1987	G	Petition for writ of certiorari filed.
2	Jan 27 1988		DISTRIBUTED. February 19, 1988
3	Jan 27 1988	X	Brief of respondent William Neal Moore in opposition filed.
4	Jan 27 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Mar 16 1988		REDISTRIBUTED. April 1, 1988
7	Apr 5 1988		REDISTRIBUTED. April 15, 1988
8	Apr 18 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Apr 18 1988		Petition GRANTED.
			**********
10	May 10 1988		Record filed.
		*	Certified copy of original record, proceedings and exhibits, box, received.
12	May 31 1988		Order extending time to file brief of petitioner on the merits until June 17, 1988.
13	Jun 17 1988		Joint appendix filed.
14	Jun 17 1988		Brief amicus curiae of Criminal Justice Legal Foundation filed.
15	Jun 17 1988		Brief of petitioner Kemp, Warden filed.
17	Jun 29 1988		Order extending time to file brief of respondent on the merits until August 6, 1988.
18	Aug 6 1988		Brief of respondent William Neal Moore filed.
19	Sep 2 1988		Reply brief of petitioner Kemp, Warden filed.
20	Sep 28 1988		CIRCULATED.
21	Sep 30 1988		Set for argument. Tuesday, November 29, 1988. (3rd case) (1 hr.)
22	Nov 29 1988		ARGUED.

87-1104

No. .....

In The
Supreme Court of the United States
October Term, 1987

RALPH KEMP, WARDEN,
Petitioner,

v.

WILLIAM NEAL MOORE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

What type of proof establishes the "new law exception" to the abuse of the writ doctrine, sufficient to render excusable a petitioner's abusive conduct in failing to assert a claim in a prior federal habeas corpus petition?

II.

What type of proof establishes that the "ends of justice" would be served by relitigating death penalty sentencing phase claims previously adjudicated adversely to a petitioner, a question which was not addressed in *Sanders v. United States,* 373 U.S. 1 (1963) or *Kuhlmann v. Wilson,* — U.S. —, 106 S.Ct. 2616 (1986)?

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No. .....

In The
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 4, 1984, and July 27, 1987.

The initial opinion of the United States District Court for the Southern District of Georgia denying Respondent's application for a stay of execution, denying Respondent habeas corpus relief and finding certain allegations to constitute an abuse of the writ and to be waived was entered on May 22, 1984. On June 4, 1984, a panel of the United States Court of Appeals for the Eleventh Circuit

affirmed the decision of the district court and adopted the district court's opinion. *Moore v. Zant*, 734 F.2d 585 (11th Cir. 1984). (Appendix A). The panel opinion was vacated by order of the Eleventh Circuit dated June 20, 1984, in which order the Eleventh Circuit granted rehearing *en banc*. (Appendix B). On July 27, 1987, the *en banc* court of the Eleventh Circuit reversed the district court's finding of abuse in part and remanded the case in part. (Appendix C). *Moore v. Kemp*, 824 F.2d 847 (11th Cir. 1987) (*en banc*). Petitioner's petition for rehearing was denied by the Eleventh Circuit on October 7, 1987. (Appendix D).

o

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit entered its opinion of which Petitioner seeks review on July 27, 1987. Petitioner's petition for rehearing was denied by the Eleventh Circuit Court of Appeals on October 7, 1987. A stay of the mandate was granted until December 15, 1987.

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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STATUTORY PROVISIONS

STATEMENT OF THE CASE

Rule 9(b) of 28 U.S.C. § 2254:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and if the prior determination was on

the merits, or if new and different grounds were alleged, the judge finds that the failure of the Petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Respondent, William Neal Moore, was indicted by the grand jury in the Superior Court of Jefferson, Georgia for the offenses of malice murder and the armed robbery of Fredger Stapleton. Respondent waived a trial by jury with respect to both charges on June 4, 1974, and thereupon entered a plea of guilty to these charges. Respondent's sentencing hearing was set for July 17, 1974. On that date, the trial court, acting as sentencer, imposed the death penalty upon Respondent following the receipt of certain testimony and evidence for the court's consideration.

Respondent's convictions and sentences were affirmed on direct appeal to the Supreme Court of Georgia in *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975). In its opinion, the Supreme Court of Georgia conducted its sentence review, which is mandatory under Georgia law in all cases in which the death penalty has been imposed, in accordance with O.C.G.A. § 17-10-35. This Court denied Respondent's petition for a writ of certiorari on July 6, 1976, in *Moore v. Georgia*, 429 U.S. 873 (1976).

A petition for a declaratory judgment was denied by the Superior Court of Jefferson County and the judgment of that court was affirmed by the Supreme Court of Georgia in *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). A petition for a writ of certiorari to review this judgment was denied by the Court in *Moore v. Georgia*, 434 U.S. 878 (1977).

Respondent, represented by counsel, filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. An evidentiary hearing was conducted on March 30, 1978, in connection with Respondent's state habeas corpus petition. On July 13, 1978, the state habeas corpus court denied Respondent the relief sought. On October 17, 1978, the Supreme Court of Georgia denied Respondent's application for a certificate of probable cause to appeal.

On November 22, 1978, Respondent filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Georgia. Following a hearing on June 18, 1979, the district court granted federal habeas corpus relief, vacating Respondent's sentence of death on the basis that the penalty was cruel and unusual under the circumstances of this case. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit and Respondent cross-appealed.

Following oral argument, the Eleventh Circuit Court of Appeals reversed the district court's judgment, insofar as the district court had conducted its own proportionality review, but granted habeas corpus relief on the basis that the sentencing court had unconstitutionally applied a nonstatutory aggravating circumstances. Petitioner filed a suggestion for rehearing *en banc* based on the latter portion of the panel opinion. The petition for rehearing *en banc* was granted, with the prior panel opinion dated June 23, 1983, being withdrawn and a new opinion, dated September 3, 1983, being substituted in its place. In its decision of September 30, 1983, the Eleventh Circuit

reversed that portion of the prior opinion granting federal habeas corpus relief.

Respondent Moore then filed a petition for rehearing and suggestion for rehearing *en banc* which was denied by the Eleventh Circuit on December 13, 1983. Next, Respondent filed a petition for a writ of certiorari which was denied by this Court on March 5, 1984.

On March 12, 1984, the district court made the judgment of the circuit court its judgment in the case of *Moore v. Balkcom and Bolton*, Civil Action No. 478-309. A new execution date was scheduled for Respondent for May 24, 1984. Respondent filed a successive petition for state habeas corpus relief in the Superior Court of Butts County, Georgia. On May 17, 1984, a hearing was held in the Superior Court of Butts County, Georgia on Respondent's motion for a stay of execution and on Petitioner's motion to dismiss the petition for writ of habeas corpus as successive within the meaning of O.C.G.A. § 9-14-51. On May 18, 1984, the Superior Court of Butts County, Georgia entered an order dismissing the petition as successive within the meaning of O.C.G.A. § 9-14-51. Respondent sought an application for a certificate of probable cause to appeal from the order of the Superior Court of Butts County, but this application was denied on May 18, 1984.

Also on May 18, 1984, Respondent filed a successive application for federal habeas corpus relief in the district court, raising some of the issues contained in the successive petition for a writ of habeas corpus filed in Butts County and other issues previously raised in other state court proceedings.

On May 21, 1984, a hearing was held in the United States District Court for the Southern District of Georgia in order to allow Respondent an opportunity to present evidence and oral argument as to each of the claims raised by Respondent on their merits, as well as to respond to the Petitioner's allegation that the successive federal habeas corpus petition constituted an abuse of the writ within the meaning of Rule 9(b).

On May 22, 1984, the district court entered an order denying Respondent's application for a stay of execution, denying Respondent habeas corpus relief and finding certain allegations to constitute an abuse of the writ and to be waived, but granting Respondent's application for a certificate of probable cause to appeal. (Appendix A). Respondent filed a notice of appeal to the Eleventh Circuit on May 22, 1984.

Oral argument was conducted before a panel of the Eleventh Circuit on May 24, 1984, following the granting of the stay of execution on May 23, 1984, by the Eleventh Circuit. On June 4, 1984, the panel of the Eleventh Circuit affirmed the decision of the district court and adopted the district court's opinion. *Moore v. Zant,* 734 F.2d 585 (11th Cir. 1984). (Appendix A).

The panel opinion was vacated by order of the Eleventh Circuit dated June 20, 1984, in which order the Eleventh Circuit also granted rehearing *en banc.* (Appendix B). On July 27, 1987, the *en banc* court reversed the district court's finding of abuse in part and remanded the case in part. *Moore v. Kemp,* 824 F.2d 847 (11th Cir. 1984). (Appendix C).

Petitioner's suggestion for rehearing *en banc* was denied by the Eleventh Circuit on October 7, 1987. (Appendix D).

Petitioner seeks review of the *en banc* decision of the Eleventh Circuit dated July 27, 1987, declining to conclude that the entire successive application for federal habeas corpus relief constitutes an abuse of the writ. (Appendix C).

REASONS FOR GRANTING THE WRIT

I. THERE EXISTS NO GUIDANCE FROM THIS COURT AS TO THE TYPE OF PROOF SUFFICIENT TO ESTABLISH THE "NEW LAW EXCEPTION" TO THE ABUSE OF THE WRIT DOCTRINE NECESSARY TO RENDER EXCUSABLE A PETITIONER'S ABUSIVE CONDUCT IN FAILING TO ASSERT A CLAIM IN A PRIOR PETITION.

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides that a second application for federal habeas corpus relief may be dismissed where there are new and different grounds alleged than in the prior petition and "the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

In *Sanders v. United States,* 373 U.S. 1 (1963), the Court addressed the question of under what circumstances a federal district court may refuse to review the merits of a "successive" petition for a writ of habeas corpus, i.e., a petition which raised grounds previously adjudicated

adversely on the merits to the petitioner in a prior proceeding. In *Sanders v. United States, supra,* the Court determined that a federal district court can refuse to entertain such a successive petition where "the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders v. United States, supra* at 18.

This Court has attempted to define the concept "ends of justice", which concept was left without precise definition by the Court in *Sanders v. United States, supra. See Kuhlmann v. Wilson,* — U.S. —, 106 S.Ct. 2616 (1986). However, neither in *Sanders* nor in *Kuhlmann v. Wilson, supra,* did the Court address those types of petitions anticipated by Rule 9(b) in which claims omitted from an initial petition are presented for litigation on their merits in a subsequent petition based on an assertion by the petitioner that these omitted claims are now based on "new law".

The appropriate treatment to be given "new law" claims is only briefly mentioned in Rule 9(b) itself. Rule 9(b) notes the district courts' obligation to consider whether a petitioner's delay in presenting a "new claim" constitutes an abuse of the writ so as to warrant the district court to decline to review the new issues on their merits. This obligation was similarly discussed by the Court in *Sanders v. United States, supra* at 17. The disposition to be made of "new law" claims is briefly discussed in the Advisory Committee Notes to Rule 9(b). These notes discuss the requirement of subsection (b) "that the judge finds a petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable." The Advisory Committee Notes also cite a noninclusive list of circumstances in which the failure to raise claims in a prior petition may be excusable, i.e., a retroactive change in the law and newly discovered evidence.

This case clearly presents for review the increasingly recurring issue of the proper application to be made of Rule 9(b) to new law claims. Respondent Moore has asserted that his six allegations, not raised in his prior application, should be considered for the first time in a subsequent application because there has allegedly been "new law" decided which touches upon these allegations.[1] Respondent in this case has attempted to excuse his abusive conduct solely by invoking the "new law" exception to the abuse of the writ doctrine.

Although it is well-settled that it is within the sound discretion of federal district court judges to determine whether a federal habeas corpus petitioner's conduct is abusive or excusable and thereby determine whether a new claim should be reviewed on its merits when raised for the first time in a second application, case law provides little guidance to federal district court judges in the exercise of their sound discretion as to "new law" claims. *See Sanders v. United States, supra* at 1079. In fact, the majority

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[1]As noted in the *en banc* decision of the circuit court in this case, Respondent asserted six allegations not raised in his prior application, which allegations Respondent claimed were based on "new law" and only one claim which he contended should be considered for the first time in his second application based on "newly discovered facts." *Moore v. Kemp, supra,* at 860.

of the case law discusses the raising of new claims when the claims have been "deliberately withheld" from a prior application, or where a claim has been "abandoned" during the litigation of a first application. *See Sanders v. United States, supra,* at 18 and *Moore v. Kemp,* 824 F.2d 847, 861 (11th Cir. 1987). Case law provides no guidance for what constitutes a sufficient excuse for simply omitting a claim from an initial application, as opposed to deliberately withholding or abandoning a claim. Further, there exists no guidance as to when the assertion that there is "new law" concerning a claim in fact excuses a failure for not having presented the claim in an earlier petition.

The Eleventh and Fifth Circuits have held that a court may refuse to litigate a claim on the merits if the failure of the petitioner to raise the claim in a prior proceeding was the result of "inexcusable neglect." *See Moore v. Kemp, supra* at 862, *citing Papskar v. Estelle,* 612 F.2d 1003, 1006 (5th Cir.), *cert. denied,* 449 U.S. 885 (1980); *Funchess v. Wainwright,* 788 F.2d 1443, 1445 (11th Cir. 1986) (*per curiam*); *Stephens v. Kemp,* 721 F.2d 1300, 1303 (11th Cir. 1983) (*per curiam*), *cert. denied,* 469 U.S. 1043 (1984); *Potts v. Zant,* 638 F.2d 727, 741 (5th Cir. Unit B Feb. 1981), *cert. denied,* 454 U.S. 877 (1981) and *Haley v. Estelle,* 632 F.2d 1273, 1275 (5th Cir. Unit A 1980). However, the excusable neglect concept has not been definitively addressed by this Court so as to articulate what constitutes the proper standard for review of new law claims and if so, what constitutes inexcusable neglect for failing to raise a claim in an initial application.

In this case, the majority of the *en banc* court in *Moore v. Kemp, supra,* attempted to flesh out the concept of "excusable conduct" or "inexcusable neglect" with reference

to new law claims. However, in the absence of relevant, definitive authority, the majority resorted to borrowing principles from other legal doctrines in an attempt to carve out the new law exception for new claims raised in abusive applications for habeas corpus relief. *Moore v. Kemp, supra* at 851. Petitioner respectfully submits that the result of the majority's borrowing of legal underpinnings from other doctrines for application in the context of abuse of the writ cases in effect sanctions the filing of eleventh hour successive petitions, especially in death penalty cases. This radical extension of exceptions to the abuse doctrine, utilizing principles from other doctrines, conflicts with the intent behind the enactment of Rule 9(b) and traditional notions of comity, finality and equity which underlie the abuse of the writ doctrine. *Moore v. Kemp,* 824 F.2d 847, 878 (Hill, J., dissenting).

Additionally, not only does the majority opinion in this case inappropriately borrow standards from other doctrines in attempting to define and apply the "new law" exception, but the majority opinion also inappropriately creates a subjective, rather than objective, test for determining whether a claim could have been raised previously or is based on "new law". The majority of the *en banc* court held that "the inquiry into whether a petitioner has abused the writ in raising a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal application." *Moore v. Kemp, supra* at 851. By creating a standard which focuses predominately on a petitioner's subjective knowledge at the time of the first application, rather than a petitioner's actual conduct, the circuit court's decision forces reviewing courts to attempt to subjectively divine what knowledge a fed-

eral habeas corpus petitioner's attorney actually had at the time the initial federal habeas corpus petition was filed.

Under this new subjective standard adopted by the circuit court, the burden of proof is removed from the petitioner, and placed on the State. The State, in order to create a factual basis from which to infer "knowledge" on the part of a petitioner, must demonstrate that the petitioner's attorney had available to him or her the "ingredients" necessary to raise a particular constitutional claim. This conflicts with Rule 9(b) which requires the burden to be placed on a petitioner to excuse his or her conduct, utilizing equitable principles. *See Moore v. Kemp, supra,* Tjoflat, J., dissenting, p. 862.

To apply this subjective test, the circuit court in this case grafts the forseeability requirement of procedural default cases onto the abuse of the writ doctrine. The adoption of the forseeability requirement dangerously affords a means for a petitioner to cavalierly excuse his conduct in failing to raise a claim by stating that the legal principle now being asserted as a "new claim" was "not forseeable by counsel". *Moore v. Kemp,* Tjoflat, J., dissenting opinion, n. 16. This subjective test affords no guidance for determining what conduct should be found abusive. Petitioner respectfully submits that instruction and guidance is needed from this Court to direct lower federal courts in the manner in which abusive conduct of a petitioner should be reviewed and under what circumstances a petitioner should be precluded from litigating "new claims" based on so-called "new law".

In short, Petitioner submits that the standard adopted in this case by the circuit court with respect to the "new

law" exception to the abuse of the writ doctrine, inexplicitly and intolerably creates a standard that allows federal habeas corpus petitioners to utilize their counsel as convenient excuses for failing to raise claims. Additionally, the circuit court's standard constitutes a totally subjective and unworkable standard for reviewing a petitioner's knowledge, rather than his or her conduct, in determining whether there has been an abuse of the writ. Finally, the circuit court's approach recklessly grafts the concept of forseeability from procedural default cases onto an abuse of the writ analysis although totally different policy concerns underlie these two doctrines.

For all of these reasons, Petitioner respectfully submits that this Court should grant a writ of certiorari to address and define the "new law" exception to Rule 9(b) and its application, especially in the context of death penalty cases.

II. THE LOWER FEDERAL COURTS ARE IN NEED OF GUIDANCE IN DETERMINING WHAT PROOF ESTABLISHES THAT "THE ENDS OF JUSTICE" WOULD BE SERVED BY RELITIGATION OF DEATH PENALTY SENTENCING PHASE CLAIMS PREVIOUSLY ADJUDICATED ADVERSELY TO A PETITIONER.

As was noted previously, in *Kuhlmann v. Wilson, supra,* the Court granted a writ of certiorari to consider when the "ends of justice" required consideration of a successive habeas corpus petition. *Kuhlmann v. Wilson, supra* at 2621-2622. The Court explicitly stated that it had granted the writ of certiorari in *Kuhlmann v. Wilson* because the previous decision of the Court in *Sanders* had

"provided little specific guidance to what kind of proof that a prisoner must offer to establish that the 'ends of justice' would be served by relitigation of the claims previously decided against him." *Kuhlmann v. Wilson, supra* at 2622. As this Court also noted in *Kuhlmann,* the failure to provide clear guidance to district court judges in applying the "ends of justice" standard leaves open the opportunity for arbitrary decisions in federal habeas corpus cases. *Id.*

Petitioner does not merely ask this Court to resolve the issue set out in *Kuhlmann v. Wilson, supra,* but rather submits that this case warrants review with respect to the application of the ends of justice test to successive applications in the context of a case in which a person convicted and sentenced to death seeks to relitigate issues relating to the sentencing phase of his or her trial, which issues have been previously adjudicated adversely to the petitioner. It is critical for district courts to be guided as to under what circumstances, sentencing phase allegations are entitled to be relitigated.

In Judge Hill's separate dissenting opinion in this case, he notes that the application of the "ends of justice" test to successive claims in the context of a death penalty case and the need, or lack thereof, of a showing of a colorable claim of factual innocence, presents a unique question. Judge Hill observed:

> In the context of death penalty habeas corpus litigation, one may be guilty of murder and yet not subject to the death penalty. Thus, when I advocate that a district judge ought to be able to hear a petition brought by one claiming innocense, I would interpret 'innocence' where the death penalty is involved as being innocence of any statutory aggravating circumstance essential to eligibility for the death penalty.

> The Petitioner in this case makes no claim of innocence; he long ago and promptly confessed to murder accompanied by statutory aggravating circumstances.

Moore v. Kemp, Hill, J., dissenting, p. 878.

Petitioner respectfully submits that due to the frequency of successive applications in the context of death penalty cases, as well as the increasing frequency of attacks on alleged defects in the critical sentencing phase of capital cases, this Court should grant review to determine when a capital litigant is entitled to relitigate claims relating to the sentencing phase, either with or without a colorable showing of factual innocence. Of course, the question then arises as to what constitutes "factual innocense" in the context of a death penalty case, if the grounds of the petition only seek to attack the sentencing phase. This particular case presents an even more compelling factual scenario, as Respondent pled guilty to the crimes charged and therefore, has confessed his factual guilt of these offenses from the outset.

The unique nature of the sentencing feature of a death penalty case and the critical nature of the sentencing phase makes pressing this Court's attention to successive claims relating to the sentencing phase of capital cases. Petitioner submits that in applying the "ends of justice" test in the context of the sentencing phase of a capital case, the only proper question to be addressed is whether the sentencing authority was mislead in its determination of whether a statutory aggravating circumstances factual existed beyond a reasonable doubt. Petitioner submits that the question is not whether the collateral reviewing court agrees with the policy determinations made by the sen-

tencer as to the appropriate punishment to be imposed. *See Collins v. Francis*, 728 F.2d 1322, 1341 (11th Cir. (1984); *Zant v. Stephens*, 456 U.S. 410 (1982).

Petitioner submits that an appropriate "ends of justice" analysis must afford deference to policy determinations regarding the appropriate punishment to be imposed made by a state court sentencing authority. This deference is warranted based on the insulation statutorily afforded under Georgia law via the requirement that a statutory aggravating circumstance first be found beyond a reasonable doubt. *See Zant v. Stephens, supra.* Thus, the ends of justice would not require relitigation of Respondent's successive claim raised in this case, because there has been a previous determination that there exists a valid statutory aggravating circumstances authorizing Respondent's death sentence. The only remaining decision to be made by the sentencer was whether, as a policy matter, the death sentence was appropriate in the context of this case. Petitioner respectfully submits that federal habeas corpus courts should not review policy determinations properly made by state sentencers, as long as the factual bases supporting the necessary statutory aggravating circumstances are shown to exist beyond a reasonable doubt.

The ends of justice analysis utilized by the circuit court with respect to successive capital sentencing phase claims is unworkable and does not provide sufficient guidance to consider what is an appropriate application of the ends of justice analysis to successive claims raised within the parameters of the sentencing phase under Georgia law.

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CONCLUSION

For all of the above and foregoing reasons, Petitioner submits that this Court should grant a writ of certiorari to provide guidance on the application of the "new law" exception to the abuse of the writ doctrine and the application of the "ends of justice test" to successive petitions brought by habeas corpus petitioners under a death sentence raising claims concerning the sentencing phase.

Respectfully submitted,

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APPENDIX A

William Neal MOORE,
Petitioner-Appellant,

v.

Walter D. ZANT, Respondent-Appellee.

No. 84-8423.

United States Court of Appeals,
Eleventh Circuit.

June 4, 1984.

Opinion on Rehearing En Banc June 20, 1984.

Appeal from the United States District Court for the Southern District of Georgia.

Before FAY, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

This matter was presented to us upon the appellant's motion for stay of execution, the appellee's motion for expedited review and the appellee's motion to dismiss the appeal. With the execution of appellant scheduled for 12:15 a.m. on May 24, 1984, the court entered a stay in order that an expedited hearing could be held. This was accomplished during the afternoon of May 24, 1984 in Atlanta, Georgia.

Having heard oral argument, reviewing briefs of counsel and studying the record, we affirm the judgment denying relief. Finding ourselves in complete agreement with the evaluation of the issues, the authorities cited as controlling and the conclusions made by the district judge in his Order of May 22, 1984, we adopt the same and append it hereto. The stay previously entered is hereby vacated.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

WILLIAM NEAL MOORE,

Petitioner

VS.

WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent

ORDER

Before the Court is the petition of William Neal Moore for a Writ of Habeas Corpus and an Order staying his execution by the State of Georgia.

I. *Background*

Petitioner murdered Fredger Stapleton in Stapleton's home during the course of an armed robbery on April 2, 1974. He waived trial by jury in the Superior Court of Jefferson County on June 4, 1974, and pleaded guilty to all charges. Judge McMillan sentenced Moore to death on July 17, 1974. Thereafter, Petitioner embarked on a ten-year trek through the state and federal court systems, seeking relief from his conviction and sentence.

The Georgia Supreme Court affirmed Moore's conviction and sentence in February, 1975, and later denied his petition for a rehearing. *Moore v. State,* 233 Ga. 861, 213

S.E.2d 829 (1975). The United States Supreme Court also denied review. *Moore v. Georgia,* 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976), *petition for reh'g denied,* 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154 (1976). Petitioner thereafter sought a declaratory judgment in State court, wherein he sought a new sentencing proceeding. Relief was denied and the denial was affirmed by the Georgia Supreme Court. *Moore v. State,* 239 Ga. 67, 235 S.E.2d 519 (1977), *cert. denied,* 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159 (1977).

Petitioner's first trip through the state habeas process resulted in no relief. *Moore v. Hopper,* CV78-22 (Sup.Ct. Tattnall Cty.1978). On October 17, 1978, the Georgia Supreme Court denied Moore's application for certificate of probable cause to appeal that decision.

Petitioner sought federal habeas relief in this Court in 1978. His first petition was voluntarily dismissed without prejudice after the Georgia Supreme Court granted a stay of execution. The execution was rescheduled for December 4, 1978. Moore again sought relief in this Court on November 22, 1978. At that time, he was again granted a stay of execution to permit this Court's consideration of his legal arguments supporting his grounds for relief.

This Court concluded that Moore's guilty plea was voluntarily, intelligently, and knowingly made. The Court further concluded that he was aware of his right to withdraw his guilty plea when he chose otherwise and that the absence of a transcript of closing arguments at his sentencing hearing did not prevent adequate appellate review.

This Court did conclude, however, that certain constitutional mandates were not observed in the state's appel-

late review of the sentencing. *Moore v. Zant,* 513 F.Supp. 772, 818 (S.D.Ga.1981). More specifically, that the imposition of the death penalty was based primarily on the location of the killing—at the victim's home—and not on the presence of the aggravating circumstances (that Moore committed malice murder while in the commission of another capital crime, armed robbery) articulated in the trial judge's order. The Georgia Supreme Court, which was bound by state statute to perform a proportionality review, failed to compare cases involving a killing in the home. Since that court violated its statutory duty to review similar cases by focusing on cases involving different circumstances, this Court undertook an independent proportionality review and concluded that the death penalty "shocked the conscience," warranting habeas relief.

On appeal, the Eleventh Circuit panel reversed this Court's judgment, concluding that an independent proportionality review should not have been conducted. The panel also concluded, however, that the state trial court had committed constitutional error in imposing the death sentence on the basis of nonstatutory aggravating circumstances. *Moore v. Balkcom,* 716 F.2d 1511 (11th Cir.1983). The respondent filed a suggestion for rehearing *en banc* on the latter portion of the panel decision. The petition was granted and the panel decision was withdrawn for *en banc* consideration.

Citing *Zant v. Stephens,* — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (narrowing function of statutory aggravating factors is achieved when a death sentence is supported by at least one of the statutory aggravating circumstances), the *en banc* court reversed that portion of the

panel decision granting habeas corpus relief. *Moore v. Balkcom,* 716 F.2d 1511 (11 Cir. 1983).

On petition for rehearing and suggestion for rehearing *en banc,* Moore argued that while the Georgia Supreme Court considered all mitigating circumstances, the sentencing judge limited his consideration to a finding that Moore had made true statements and had cooperated with the authorities. Moore further argued that Judge McMillan "viewed the death sentence as mandatory in this case and did not understand that he possessed discretion to impose a life sentence. *Moore v. Balkcom,* 722 F.2d 629 (11th Cir. 1983). The Eleventh Circuit panel concluded that there was no basis in the record in the case to support either of these arguments. The suggestion for rehearing *en banc* was denied. *Id.,* at 630.

Once again Moore petitioned the United States Supreme Court for review and once again it was denied. *Moore v. Balkcom,* — U.S. —, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984).

Moore again instituted state habeas proceedings on May 11, 1984. On May 18, 1984, the Superior Court of Butts County, Georgia, dismissed the petition as successive within the meaning of O.C.G.A. § 9-14-51. The Georgia Supreme Court denied review on the same day. That afternoon, Moore filed for federal habeas relief in this court. Execution is scheduled for May 24, 1984. Consideration of his application for a stay of execution must therefore be made "within the shadow of the date and time set for execution." *Stephens v. Kemp,* — U.S. —, —, 104 S.Ct. 562, 562, 78 L.Ed.2d 370, 372 (1983) (dissenting opinion).

II. *Conclusion*

Petitioner has presented nine grounds for relief:

1) The State failed to inform petitioner of his right to remain silent and of his right to counsel prior to a custodial interrogation performed for the purpose of gathering relevant sentencing information.

2) Petitioner was sentenced on the basis of materially false and misleading information contained in the presentence report.

3) The sentencing judge relied in part on a presentence report to which neither petitioner nor his counsel were afforded a meaningful opportunity of review.

4) The false and misleading information in the presentence report violated the mandate of *Proffitt v. Wainwright,* 685 F.2d 1227 (11th Cir.1982), *modified,* 706 F.2d 311 (11th Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), insofar as the information was not presented in open court, by sworn witnesses subject to cross-examination.

5) The presentence report defects prevented petitioner from obtaining a meaningful appellate review in violation of his Eighth and Fourteenth Amendments.

6) Petitioner's death sentence is excessive and disproportionate under the Eighth and Fourteenth Amendments since it was imposed despite his repeated and uncontradicted denial of any intent to kill the victim. *See Enmund v. Florida,* 458 U.S. 782, 798, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982).

7) Petitioner is an indigent black man convicted of the murder of a black man. His sentence and execution

therefore will be arbitrary and unconstitutional in light of the State's alleged practice of discriminating on the basis of race of both the victim and the defendant. *See Spencer v. Zant,* 715 F.2d 1562 (11th Cir.1983), *vacated for reh'g en banc,* 715 F.2d 1562 (1983); *McCleskey v. Zant,* 580 F. Supp. 338 (N.D.Ga.1984), *app. pending,* 729 F.2d 1293, No. 84-8176 (to be argued before 11th Cir., *en banc,* in June, 1984); *Ross v. Hopper,* 716 F.2d 1528 (11th Cir.1983), *vacated for reh'g en banc,* 729 F.2d 1293 (11th Cir.1984).

8) Petitioner received ineffective assistance of counsel during the sentencing phase before the trial court.

9) Since the sentencing judge expressly relied on the prospect of appellate review or the United States Supreme Court's invalidation of Georgia's capital statutes, it attached diminished consequences to the sentence of death as imposed and thus took less than full responsibility for the sentencing decision in violation of petitioner's Eighth and Fourteenth Amendment right.

Respondent has pleaded abuse of the writ, shifting to petitioner the burden to prove by a preponderance of the evidence that he has not engaged in that conduct. *Stephens v. Kemp,* 721 F.2d 1300, 1303 (11th Cir.), *reh'g en banc denied,* 722 F.2d 627 (11th Cir.), *application for stay granted,* — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983); *Price v. Johnston,* 334 U.S. 266, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1947); *Jones v. Estelle,* 722 F.2d 159, 164 (5th Cir. 1983). Under the Rules Governing Section 2254, Cases in the United States District Courts. (hereafter 28 foll. § 2254),

> [a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different

> grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b). "The doctrine of abuse of the writ has developed as a result of the familiar rule of law that a denial of an application for habeas corpus is not *res judicata* with respect to subsequent applications." *Potts v. Zant*, 638 F.2d 727, 738 (5th Cir. Unit B 1981) citing *Sanders v. United States*, 373 U.S. 1, 7, 83 S.Ct. 1068, 1072, 10 L.Ed.2d 148 (1963).

> Because of the inapplicability of *res judicata* to habeas corpus, prisoners have in the past frequently filed successive petitions, alleging claims already adequately determined in prior petitions, *or alleging different claims which could have been adequately pleaded and adjudicated in prior petitions.* In order to curb the opportunity for prisoners to file nuisance or vexatious petitions, and to ease the burden on the courts arising from such petitions, guidelines have evolved as to when a district court, in the exercise of its sound judicial discretion, may decline to entertain on the merits a successive or repetitious petition. These guidelines reflect a concern that in the absence of abuse, a federal district court will adjudicate at least once the claims of a petitioner.

Potts, at 738. (Emphasis added). *See also Fay v. Noia*, 372 U.S. 391, 423, 83 S.Ct. 822, 840, 9 L.Ed.2d 837 (1963).

The *Sanders* court divided into two categories successive applications for habeas relief. The first classification specified the principles governing successive motions based on grounds previously addressed by the habeas

courts. The second classification includes both those successive applications that assert grounds different from those presented in a prior application, along with those that assert grounds presented earlier but not adjudicated on the merits.

> Regarding the first classification, a federal court may give controlling weight . . . to denial of a prior application for federal habeas . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant to the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Smith v. Kemp, 715 F.2d 1459, 1468 (11th Cir.1983), *application to vacate stay denied*, — U.S. —, —, 104 S.Ct. 19, 55, 77 L.Ed.2d 1414, 1446, — U.S. —, 104 S.Ct. 55, 78 L.Ed.2d 74 (1983), citing *Sanders*, 373 U.S. at 15, 83 S.Ct. at 1077; *cert. denied*, — U.S. —, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983). In *Smith*, the Eleventh Circuit emphasized that

> [i]n determining whether the "ends of justice" would be served by readdressing the merits of the same contention as raised in the prior petition, we must look at objective factors, such as whether this was a full and fair hearing with respect to the first petition and whether there has been an intervening change in the law. [cits]

Id.

A district court may avoid full consideration of the merits regarding the second (new claims) classification only if there has been an abuse of the writ. In order to find an abuse of writ, the Court must find that presentation of wholly new issues resulted from 1) the intentional

withholding or intentional abandonment of those issues on the initial petition, or 2) inexcusable neglect. *Stephens, supra,* 721 F.2d at 1303, citing *Potts v. Zant,* 638 F.2d 727, 740-41 (5th Cir. Unit B), *cert. denied,* 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981); *see also Paprskar v. Estelle,* 612 F.2d 1003 (5th Cir.1980), *cert. denied,* 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980). The Petitioner must show the absence of inexcusable neglect.

> According to *Fay* [*v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) relied on by the *Sanders* court], a petitioner loses the right to have a claim considered on a successive petition if he "understandingly and knowingly forewent the privilege," 372 U.S. at 439 [83 S.Ct. at 849] [cits], of raising the claim in his initial petition. The bar "depends on the considered choice of the petitioner." *Id.* But note that the inquiry is not whether the petitioner intended to give up his right to have a claim heard at all. It is whether he withheld it without legal excuse when he filed his earlier petition.

Jones v. Estelle, 722 F.2d 159, 163 (5th Cir.1983). Withholding or failing to timely present a claim may be deemed to be an "abuse of the writ."

The "abuse of the writ doctrine should be governed by equitable principles." *Stephens, supra,* — U.S. at —, 104 S.Ct. at 563, 78 L.Ed.2d at 373; citing *Sanders v. United States,* 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed. 2d 148 (1963). In *Sanders,* the court

> noted that consideration of abuse normally is left to the 'discretion of federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits.'

Stephens, — U.S. at —, 104 S.Ct. at 563, 78 L.Ed.2d at 373, quoting *Sanders,* 373 U.S. at 18, 83 S.Ct. at 1078.

Thus, this Court should look to Petitioner's reasons for not having raised in his earlier petition the claims raised in support of his present petition, in addition to any claims previously raised and addressed and those raised but not addressed. Case law in this circuit indicates that this must be done in light of the fact that "[t]he 'abuse of the writ' doctrine is of rare and extraordinary application. *Paprskar v. Estelle,* 612 F.2d at 1007; *Hardwick v. Doolittle,* 558 F.2d 292, 296 (5th Cir.1977), *cert. denied,* 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 [cits] (1978); *Simpson v. Wainwright,* 488 F.2d 494, 495 (5th Cir. 1973); *see also Galtieri v. Wainwright,* 582 F.2d 348, 368 (5th Cir.1978) (*en banc*) (J. Goldberg, dissenting)." *Potts,* at 741 (footnote omitted). Accordingly,

> [i]f a petitioner is able to present some 'justifiable reason' explaining his actions, reasons which 'make it fair and just for the trial court to overlook' the allegedly abusive conduct, the trial court should address the successive petition. *Price v. Johnston,* 334 U.S. 266 at 291 [68 S.Ct. 1049 at 1063, 92 L.Ed. 1356] [cits]; *Paprskar v. Estelle, supra.*
>
> *Potts,* at 741.

These general principles boil down to the idea that a petitioner can excuse his omission of a claim from an earlier writ if he proves he did not know of the "new" claims when the earlier writ was filed. The inquiry is easily answered when the claim has been made possible by a change in the law since the last writ

> or a development in facts which was not reasonably knowable before.

Jones v. Estelle, 722 F.2d 159, 165 (5th Cir.1983) (footnotes omitted).

Regarding the "changes in the law" consideration, the *Jones* court acknowledged that "the Supreme Court in *Engle v. Isaac*, 456 U.S. 107 [102 S.Ct. 1558, 71 L.Ed.2d 783] (1982) [cits] charges a prisoner with a duty to anticipate changes at the pain of forfeiture under a state contemporaneous objection rule,[ ]" *id.*, at n. 5. The court expressly declined, however, to "define the scope of a petitioner's needs to anticipate changes in the law or decide whether the *Engle* duty extends to a habeas petitioner attempting to explain omitted claims." *Id.*

The Jones court did emphasize that less solicitude should be given petitioners who, as in the instant case, were represented by counsel during earlier habeas proceedings. *See also Woodard v. Hutchins*, — U.S. —, —, n. 3, 104 S.Ct. 752, 753 n. 3, 78 L.Ed.2d 541, 544 n. 3 (1984).

Finally, despite the "rare and extraordinary application" of Rule 9(b) alluded to in *Potts*, it is apparent that a majority of the Supreme Court, faced with an irksome series of eleventh hour appeals, has underscored the necessity of the Rule.

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, — U.S. —, —, 104 S.Ct. 752, 753, 78 L.Ed.2d 541, 545 (1984) (five Justices concurring in per curiam opinion); *see also Antone v. Dugger*, — U.S. —, 104 S.Ct. 962, 79 L.Ed.2d 147 (1984); *Jones v. Estelle*, 722 F.2d 159 (5th Cir.1983). Citing *Woodard*, the Eleventh Circuit recently barred an untimely insanity claim because of abuse or writ in *Gooch v. Wainwright*, 731 F.2d 1482 (11th Cir.1984).

Petitioner asserts that four of the above claims were not previously presented to this Court because they depend upon changes in the law occurring subsequent to the filing of his state and federal habeas petitions in 1978. He maintains, that a fifth claim depends on the independent development, since 1978, of facts that show a constitutional violation. Three other claims have been presented previously to this Court by Petitioner's former attorney in an amendment to his 1978 petition. Those claims were not considered because this Court declined to permit such amendment, granting relief on other grounds. The ninth claim, Petitioner asserts, "was not present previously because of conflicts between petitioner and his state habeas corpus counsel, and because of the unfamiliarity of that counsel with relevant facts and legal principles." Petition at 6.

Finally, where such procedural default principles are applicable, Petitioner must show cause and prejudice before this Court can consider his claims, even where abuse of writ is not evident. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Weber v. Israel*, 730 F.2d 499 (7th Cir.1984) (where state

withholds right of appellate review of issues not raised at trial, federal courts will not undermine state's interest in orderly procedure by allowing defendant to litigate in federal habeas proceeding; federal habeas relief unavailable absent showing of cause and actual prejudice; *Smith v. Kemp*, 715 F.2d 1459, 1469 (11th Cir.1983); *Shriner v. Wainwright*, 715 F.2d 1452, 1458 (11th Cir.1983).

The Court will therefore examine each claim for "abuse of writ" and waiver purposes and address those issues warranting treatment on the merits.

A. *The Estelle v. Smith Claim*

Petitioner argues that the state failed to inform him, while he was in custody, of his right to remain silent and of his right to counsel prior to questioning by a probation officer preparing a presentence report. He bases this claim on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

In *Smith*, a court ordered the psychiatric examination of the defendant while he was in custody. Smith was not advised of his right to remain silent; nor was he told that any statement he made could be used against him at the ensuing sentencing hearing. Applying *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966) and *In Re Gault*, 387 U.S. 1, 52, 87 S.Ct. 1428, 1456, 18 L.Ed.2d 527 (1967), the court held that admission of the interviewing doctor's testimony at the sentencing phase of his trial violated Smith's Fifth Amendment privilege against compelled self-incrimination. The court further held that Smith's Sixth Amendment rights were violated, citing, *inter alia*, *Kirby v. Illinois*, 406 U.S. 682, 688-

689, 92 S.Ct. 1877, 1881-1882, 32 L.Ed.2d 411 (1972). Finally, in *Battie v. Estelle*, 655 F.2d 692, 699 (5th Cir.1981) the court held that "*Smith* did not establish a new principle of federal constitutional law because that decision merely applied already fixed principles to a new factual situation[,]" thus warranting retroactive application.

Respondent argues that since *Smith* was merely an extension of existing constitutional law, Petitioner should have raised this claim in his earlier habeas petitions. In fact, Petitioner did raise in his first state habeas petition the contents of his presentence report, asserting that neither he nor his counsel had been afforded an adequate opportunity to review its contents and to explain or rebut it prior to sentencing. The first state habeas court found that Petitioner's attorney was furnished with a copy of the report in question and this Court declined to address the claim primarily on that ground. *Blake v. Zant*, 513 F.Supp. 772, 805 (S.D.Ga.1981). Therefore, Respondent argues, both the contents of the report and the report itself have been previously litigated. Further, according to Respondent, since no "new" changes in the law have occurred, and since previous litigation shows that Petitioner could have raised this issue in the past (especially in the first federal habeas proceeding), this claim should be dismissed as an abuse of writ.

Petitioner insists that Smith was a "new" change in the law and that the equitable considerations inherent in Rule 9(b) disallow a bar of this claim under the "abuse of writ" doctrine. Furthermore, Petitioner submitted at the May 21, 1984 hearing the affidavit of his first habeas counsel, James C. Bonner. Mr. Bonner attests that former

defense counsel included in the first federal habeas petition only exhausted claims. He was "unaware of any federal constitutional basis upon which he could argue that the failure of the probation officer to warn Mr. Moore violated the federal constitution." Second Bonner Affidavit 2.

Disposition of this claim thus turns on whether the change in the law was sufficient to constitute a "justifiable reason . . . mak[ing] it fair and just for t[his Court] to overlook the allegedly abusive conduct. . . ." *Potts*, at 741. That is, the Court must consider whether Petitioner met his burden of proving excusable neglect in not raising this issue in past petitions. *Jones v. Estelle, supra*, at 164 & n.4, 165.

Relevant to this inquiry is the fact that Petitioner was represented by counsel, as opposed to proceeding *pro se*. This Court finds persuasive the Fifth Circuit's reasoning in *Jones* that less deference may be given to Petitioner's reasons for neglected claims when Petitioner has been represented by counsel. However, the *Jones* court considered "new" claims in a successive petition, noting that the "new" claims were not based on a later change in law. 722 F.2d at 167 n. 8.

Also relevant to this Court's inquiry is the fact that *Potts, Paprskar, Haley v. Estelle*, 632 F.2d 1273 (5th Cir. 1980) and *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978), among other "abuse of writ" cases,[1] may have had

1. There was no need to question the standard for abuse of the writ in *Stephens v. Kemp, supra*, 721 F.2d 1300, which was later stayed, since the issues were largely disposed of on the merits or on other grounds.

their vitality weakened by recent Supreme Court cases concerning exhaustion. This trend was recognized by the *Jones* court.

> Underlying *Galtieri* and *Paprskar* was a greater willingness to tolerate unexhausted claims than the Supreme Court in *Rose v. Lundy*, 455 U.S. 509 [102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)] [cits], later made plain was allowable. *Galtieri* allowed appellate disposition of mixed petitions and *Paprskar* dwelled upon the absence of connection between the exhausted and non-exhausted claims. . . .
>
> The *Lundy* court's call for the dismissal of mixed petitions would have little meaning if it could be avoided by withholding unexhausted claims, or deleting them by an amended petition. Justice O'Connor's plurality opinion noted that its rule of dismissal, calculated to accommodate concerns for federalism and finality of conviction with access for state prisoners to the federal courts, required the doctrine of writ abuse for its enforcement.

Jones, 722 F.2d at 168 (footnote omitted).

Further question concerning what degree of deference should be given to "new law" claims is raised by the Supreme Court's decision in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *see also States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). In *Engle*, assertions by state prisoners in federal habeas corpus proceedings that jury instructions given at their trials violated their due process rights were barred because the prisoners did not comply with a state contemporaneous objection rule. Specifically, Isaac failed to comply with an Ohio court rule mandating contemporaneous objections to jury instructions. Ohio law required defen-

dants to prove an affirmative defense by a preponderance of the evidence. Ten months after his conviction, however, the Ohio Supreme Court ruled the jury instructions defective. Nevertheless, Isaac was denied the benefit of that ruling because he failed to object to the instructions at trial, as mandated by state law. Isaac raised a constitutional challenge to the jury instructions in federal court under 28 U.S.C. § 2254, in effect arguing that the instructions incorporated an unconstitutional burden-shifting. The district court determined that the claim was waived by Isaac's failure to object at trial and that no cause or prejudice could be shown. The Sixth Circuit reversed, ruling that *Wainwright v. Sykes* did not preclude consideration of Isaac's due process claim. Rather, the court found that the Ohio courts had consistently held defendants to the burden of proving affirmative defenses by a preponderance of the evidence. The futility of objecting to the instructions at trial supplied adequate cause for Isaac's waiver.

In reversing the Sixth Circuit, the Supreme Court reaffirmed the rule of *Wainwright v. Sykes* and held that Isaac waived his claim by failing to object at trial. The court found no cause for Isaac's default based on the asserted ground that he could not have known at the time that the Due Process clause addressed the burden of proving affirmative defenses. The Court held this despite petitioners' arguments that they could not have known at the time of trial that the state jury instructions were constitutionally objectionable. The court emphasized that numerous defendants had previously relied on *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.

2d 508 (1975). "In most cases, the defendants' claims countered well-established principles of law." 456 U.S. 132, 102 S.Ct. 1574. In light of the many challenges made elsewhere, the court "could not say that [the state prisoners] lacked the tools to construct their constitutional claim."

> We need not decide whether the novelty of a constitutional claim ever established cause for failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair.
>
> 456 U.S. at 131, 102 S.Ct. at 1573.

Further expounding on that theme, the court stated:

> We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.
>
> 456 U.S. at 134, 102 S.Ct. at 1574.

It is true that "exhaustion" (*Rose*) and "procedural default" (*Engle*) case law analysis is being intermixed in this Court's "new law," abuse-of-writ analysis. It is also true, however, that the underlying policies of comity and

finality of litigation seen in *Rose* and *Engle*, along with *Woodard v. Hutchins*, and *Antone v. Dugger, supra*, cannot be ignored. *Jones, supra; see also Barefoot v. Estelle*, — U.S. —, —, 103 S.Ct. 3383, 1391-1392, 77 L.Ed.2d 1090, 1100-1101 (1983). Indeed, the *Jones* court, when considering abuse of writ in the "new claims" context, referred to the *Engle* court's reasoning without deciding whether the *Engle* duty to anticipate future changes in the law extends to a habeas petitioner attempting to explain omitted claims. 722 F.2d at 165 n. 5. *Jones* did expressly refer to this underlying concern, however, when it noted that the case before it

> does not present the question of whether a lawyer's omission of a claim from an earlier writ petition may be excused by a later change in law which could have reasonably been anticipated. Relatedly, note the suggestion of Justice Blackmun that a state could require a petitioner to assert all claims in a single petition. Escape from a failure to do so would be measured by *Wainwright v. Sykes*, 433 U.S. 72 [97 S.Ct. 2497, 53 L.Ed.2d 594] [cits]; *Rose v. Lundy*, 455 U.S. 509, 525 n. 2 [102 S.Ct. 1198, 1207 n. 2, 71 L.Ed.2d 379] [cits] (1982) (Blackmun, J., concurring in the judgment).

The case before this Court *does* present the question of "whether a lawyer's omission of a claim from an earlier petition may be excused by a later change in law which could have reasonably been anticipated." *Id.* Furthermore, the state in this case *does* require a petitioner to assert all claims in a single petition. O.C.G.A. § 9-14-51. The state court expressly concluded that "since this claim could have been raised in Petitioner's original habeas corpus petition the Court finds that he has waived the right

to do so in this successive habeas petition." *Moore v. Kemp*, No. 6381 at p. 2 (Sup.Ct. Butts Cty. May 18, 1984) (Respondent's Exh. 2), *certificate of probable cause and of motion for stay of execution denied* (Ga. Supreme Court No. 2875, May 18, 1984) (Respondent's Exh. 3). 1984) (Respondent's Exh. 3).

This Court holds that the analysis of the "new law" claims found in the procedural default cases (*Engle*) constitutes an appropriate basis for evaluation of the *Estelle v. Smith* "new law" claim in this case. Accordingly, the Court turns to *Engle* as well as the recent Sixth Circuit case of *Watters v. Hubbard*, 725 F.2d 381 (6th Cir.1984) for disposition of this issue.

In applying these cases, it becomes readily apparent that this claim must fail when it is compared to the degree to which the state prisoners were held to have possessed the "constitutional tools" to anticipate and argue the "new law" claim rejected in *Engle*. The same conclusion is reached by this Court under *Watters*. In *Watters*, the petitioner argued that the state prosecutor's cross-examination questioning of his court-appointed psychiatrists violated his privilege against self-incrimination. The state argued that Watters failed to make a specific objection as required under Ohio law and that the claim was thus barred under *Engle*.

In denying Watters' claim, the Sixth Circuit concluded that since the case law "by the time of his trial recognized the Fifth Amendment implications inherent in evidence of inculpatory admissions to examining psychiatrists [cits]," the claim was not so "novel" as to constitute cause and that he was not "without the tools to make a

specific objection" until the Supreme Court's holding in *Estelle v. Smith*, 725 F.2d at 383.[2]

This Court emphasizes that to the extent the *Engle*-type cases might represent a higher standard than with other abuse of writ cases, it is undertaken in this case because Petitioner has been represented by counsel at the trial and habeas court stages in this process.[3] Different considerations are present in *pro se* situations. *Jones; Compare Sockwell v. Maggio*, 709 F.2d 341 (5th Cir.1983), cited in *Jones* at 164 (no abuse of writ where *pro se* petitioner alleged *Edwards v. Arizona* claim, since *Edwards* was decided three years after petitioner's previous habeas petition was dismissed in 1978).

B. *The Lockett v. Ohio and Gardner v. Florida Claims*

Petitioner next contends that his sentence was based on a presentence report containing inaccurate information, thus depriving him of his constitutional right to be sentenced based on accurate information and depriving him

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2. Additionally, since Watters called the psychiatrists as his own witnesses and was not interrogated in a custodial setting, no prejudice could be shown. Once "cause" cannot be shown, however, the "prejudice" requirement falls from immediate consideration. The *Engle* court ceased further consideration of the case after it concluded that "because the [state prisoners] have not demonstrated cause for the default, they are barred from asserting that claim under 28 U.S.C. § 2254. . . ." 456 U.S. at 135, 102 S.Ct. at 1575. Thus, the prejudice requirement would not be applicable to abuse of writ considerations.

3. In this context, the Court would find Petitioner's ineffective assistance of counsel argument to be without merit, since he would in effect be asserting that both of his successive habeas counsel were incompetent and that neither Bonner nor Hicks made use of the "constitutional tools."

of a meaningful opportunity to review and correct the information. In Petitioner's Appendix K and L, he asserts that material omissions and false statements were in the presentence report. Ten "convictions" enumerated in the report, for example, were in fact either mere arrests or juvenile court adjudications. Petitioner attests that he did not see the report until two years after the sentencing. He argues that under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (sentencer must consider all mitigating evidence), the sentencing judge failed to rely on a proper record of the mitigating circumstances. Petitioner further asserts that he was denied an opportunity to rebut the contents of his presentence report in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *see also Raulerson v. Wainwright*, 508 F.Supp. 381, 383-85 (M.D.Fla.1980), *on appeal following resentencing*, 732 F.2d 803 (11th Cir.1984).

Respondent urges application of Rule 9(b) to this claim, since the information to which Petitioner refers is not "newly discovered" and any alleged inaccuracies in the presentence report could have been raised, if not before the sentencing court, certainly before the Georgia Supreme Court on direct appeal or before the first state habeas court.

As mentioned above, Petitioner's first federal habeas petition was filed in this Court in 1978. In an amended petition for a writ of habeas corpus filed in 1980 (Petitioner's Appendix "E"), Petitioner's second habeas counsel, H. Diana Hicks, raised additional claims, including: that the sentence of death was based in part on a presentence report which was not disclosed to the Petitioner.

Id., at 7-8. This Court concluded that it could

> see no sound reason for permitting further amendment at this late stage of the present case. As respondent points out, the petitioner here has been represented at all times. Furthermore, counsel made explicit reference to the presentencing report issue in the original habeas petition, thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from Mr. [Hinton R.] Pierce, [Petitioner's trial court counsel,] and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence and the trial transcript, which appears to show that ther eport was turned over to Mr. Pierce, *see* Transcript of July 17, 1978, at 27-28, the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination. Thus, the Court can find no basis for concluding that any sound reason exists to allow new counsel to resurrect this question. Motion to amend with respect to this argument is therefore denied.

513 F.Supp. at 805.

Petitioner argues that the evidence suggests his trial court counsel did not in fact receive the presentence report (*see* Petitioner's Appendix K at 4), and that if he did, he could not have had sufficient time to examine it, especially in light of its voluminousness. Thus, Petitioner maintains that he was denied effective assistance of counsel. *See Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronic,* — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Furthermore, he asserts that his first habeas counsel, James Bonner, was ineffective because he was under the

mistaken belief that since Petitioner had plead guilty, he could not raise this claim in first state habeas petition as a result of *McMann v. Richardson,* 397 U.S. 759, 770-71, 90 S.Ct. 1441, 1448-49, 25 L.Ed.2d 763 (1970) ("a guilty plea connot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded attorneys in criminal cases.'" *Strickland,* — U.S. at —, 104 S.Ct. at 2064). *See* Petitioner's Appendix 1 (Unsworn, unsigned affidavit of James Bonner asserting that he was 1) ignorant of the law, 2) was struggling with an unmanageable caseload at the time, 3) failed to make a factual investigation and 4) refused to accede to Moore's request to raise the ineffective assistance of counsel claim). Thus, Petitioner in effect argues that two attorneys successively rendered him ineffective assistance of counsel, and only when Diana Hicks took responsibility for his case was the claim properly raised.

Laced throughout Petitioner's present set of claims are ineffective assistance of counsel assertions. In *Jones,* the Fifth Circuit noted that "[c]riminal defendants daily entrust their liberty to the skill of their lawyers." 722 F.2d 159. Moreover,

> [a]capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, *see Barclay v. Florida,* 463 U.S. —, —, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision.
>
> *Washington, at* —, 104 S.Ct. at 2064.

The first state habeas court reproduced the testimony of Petitioner's counsel at the sentencing hearing and considered the Respondent's exhibit showing that a copy of the report was furnished to Petitioner's counsel. The state habeas corpus record further demonstrates that trial court counsel requested a short period of time prior to the hearing in which to review the report's contents and make any comments.

Petitioner emphasizes that because of the magnitude of inaccuracies contained in the report, that "short period" of time was obviously not sufficient for Pierce to glean even the more obvious errors. Pierce was either unable to comprehend the problem or did not take enough time to study the report, or both.

> Judicial scrunity of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that an act or particular omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-34 [102 S.Ct. 1558, 1574-75, 71 L.Ed.2d 783] (1982).

Washington, at —, 104 S.Ct. at 2065.

The Supreme Court was particularly wary of "[t]he availability of intrusive post-trial inquiry into attorney performance . . . [which] would encourage the proliferation of ineffectiveness challenges." *Id.*

Petitioner in this case has raised sufficient questions for this Court to hesitate, for if attorney Pierce did fail to scrutinize the report, then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information. Where the interests of justice so require, such a claim should be entertained. It was a similar hesitation that caused Justice O'Connor in *Eddings* to conclude that "[b]ecause of the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." 455 U.S. 104, 117 n., 102 S.Ct. 869, 878 n., 71 L.Ed.2d 1.

Unlike *Washington*, it is arguable in this case that the corrected information "would [not] barely have altered the sentencing profile presented to the sentencing judge." *Id.*, — U.S. at —, 104 S.Ct. at 2071.

Nevertheless, repeated opportunities to litigate this issue have been provided in this case. Such opportunities include the first state habeas proceeding—despite the Bonner affidavit attesting otherwise—as well as the latest sojourn to the Eleventh Circuit, where that court concluded

> Judge McMillan properly considered all of the evidence in mitigation before exercising his discretion to impose death. The court listened carefully throughout the presentation of mitigating evidence, asking each witness questions, and concluding with each witness by asking whether he had anything further to say. Moore's relatives testified that Moore was a good boy who had never before been in any serious trouble. Moore testified at the sentencing hearing that he shot and killed the victim out of a combination of fright and intoxication. Then, the sentencing judge further noted as additional mitigating circumstances the fact of Moore's truthfulness and cooperation. Furthermore, Judge McMillan made it clear at the sentencing proceeding that he understood and accepted

> the mandate of Georgia law . . . that he had discretion in sentencing.

722 F.2d ~~at~~ 630.

Because Petitioner himself could have raised this claim on direct appeal to the Georgia Supreme Court;[4] because he did raise it in his first state habeas petition, and because he failed to properly present these issues in his federal habeas petition, this Court is warranted under the "abuse of writ" doctrine to deny these claims.

C. *Proffitt v. Wainwright Claim*

Under *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified*, 706 F.2d 311 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 508, 509, 78 L.Ed.2d 697 (1983), the Eleventh Circuit recognized the specific right accorded a capital defendant to confront witnesses whose statements are used against him. 685 F.2d at 1254. Petitioner argues that 1) there was false and misleading information contained in the presentence report and 2) it was not presented in open court to the extent that the witnesses supplying the information could have been confronted, under oath, and subjected to cross-examination.

Respondent again urges application of Rule 9(b), emphasizing that *Proffitt*, as did *Estelle v. Smith*, *supra*, established no new legal principles, but merely interpreted

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4. Petitioner's Appendix D is his amendment to the first federal habeas petition. That amendment makes clear Petitioner's capabilities as a litigator, as well as the fact that he raised sophisticated claims, but not the incomplete sentence report claim, even though he saw it, according to his affidavit, two years after his sentence was imposed. Petitioner's Appendix J at ¶ 6.

the Sixth Amendment confrontation clause based on *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Petitioner's theory under *Proffitt* is even weaker than his *Smith* claim analyzed supra. This Court's analysis under § II, Part A. of this decision is controlling and thus this claim is denied.

D. *The Zant v. Stephens Claim*

Similarly, *Stephens* created no new constitutional principles helpful to Petitioner's argument that the erroneous presentence report denied him his right to accurate and meaningful appellate review. In *Stephens*, the court held that the limited function served by the jury's finding of a statutory aggravating circumstance does not render Georgia's statutory scheme invalid under the holding of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Fifth Circuit had held that under *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), a jury verdict based on multiple grounds must be set aside if the reviewing court cannot ascertain whether the jury relied on an unconstitutional ground. It also "believed that the presence of the invalid circumstances 'made it possible for the jury to consider several prior convictions which otherwise would not have been before it.'" — U.S. at —, 103 S.Ct. at 2739, 77 L.Ed.2d at 245.

In reversing the Fifth Circuit, the Supreme Court recognized the Georgia Supreme Court's reasoning, wherein that court distinguished *Stromberg* as a case in which a

jury might have relied exclusively on a single invalid ground, noting that the jury in this case had expressly relied on valid and sufficient grounds for its verdict. Since the statutory scheme provided that the jury was required to find at least one aggravating circumstance is writing and that appellate review was mandatory, the limited purpose served by the finding of the statutory aggravating circumstance did not allow a jury unlimited discretion in applying the death penalty.

Petitioner raised on direct appeal (Petitioner's Appendix A at ¶ 5(B)) an issue concerning an insufficient record and raised the issue in his first state habeas brief in the wake of *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). *Stephens* does not create a new constitutional right and does not qualify as a "new law" claim in light of *Gregg*. Presentation of this claim at this late date cannot be excused under Rule 9(b).

E. *The Enmund v. Florida Claim*

Under this theory, Petitioner argues that his death sentence is excessive and disproportionate because he did not intend to kill his victim. The issue was factually raised in his first state habeas petition (*See* Petitioner's Appendix A) and the state habeas court found that Petitioner admitted intent to kill. (Petitioner's Appendix B at 7).

The record shows that this claim was exhausted, was presented for this Court's review, and was initially resolved in his favor. *Blake v. Zant*, *supra*, at 818. Rule 9(b) is applicable to this claim, which is also without merit. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

F. *The McCleskey v. Zant Claim*

Moore next argues that he will be executed in an arbitrary and discriminatory manner in violation of the Eighth and Fourteenth Amendments. He is a black man who murdered a black victim and his claim therefore falls within that umbrella of "Baldus Study"[5] cases currently pending before the Eleventh Circuit. *See, e.g., Spencer v. Zant, supra; McCleskey v. Zant, supra,* and *Ross v. Hopper*, 716 F.2d 1528 (11th Cir.1983), *vacated for reh'g en banc*, 729 F.2d 1293 (11th Cir.1984). Under this theory,

> [i]f a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 [97 S.Ct. 555, 50 L.Ed.2d 450] [cits] (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantially the sentencing decision.

Spinkellink v. Wainwright,[6] 578 F.2d 582 (5th Cir.1978), *reh'g denied*, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667, *application for stay denied*, 442 U.S. 1301, 99 S.Ct. 2091, 60 L.Ed.2d 649 (1979); *McCleskey v. Zant*, 580 F.Supp. at 347.

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5. Dr. David Baldus, a statistician and social scientist has conducted "a complex scientific study of the administration of Georgia's death penalty, focusing on the issues raised in [*Spencer v. Zant, supra,* and other cases]. 715 F.2d at 1579. Federal habeas petitioners in the above cases seek to use this study to attack the constitutionality of Georgia's death penalty statute.

6. The *Spencer* panel opinion emphasized that *Spinkellink* and *Smith* establish that the merits of an attack on the constitutionality of the death penalty as applied turn on the quality of the evidence presented. 715 F.2d at 1581.

Respondent asserts that Petitioner alleged "arbitrariness and capriciousness" in the Georgia death penalty scheme in both his first state habeas petition and in his first federal habeas petition. However, Petitioner did not raise the claim of discrimination in the imposition of the death penalty which he now seeks to raise in his second federal habeas petition. He is thus raising the "Baldus Study" claim for the first time in this court and thus the claim should be barred. Moreover, Respondent contends, none of the decisions Petitioner cited give him any right to raise the issue at this late date. Finally, he was free to raise empirical study claims in the past, as other state prisoners have done. *See, e.g., McCorquodale v. Balcom*, 525 F.Supp. 408, 429 (N.D.Ga.1981).

Petitioner maintains that he previously raised this issue in substance, but the major statistical studies were not available to him when he filed his first habeas petition. The Court notes a similar set of facts in *Stephens v. Kemp*, 721 F.2d 1300 (11th Cir.1983). In that case, an Eleventh Circuit panel dismissed a similar claim for abuse of writ. "The only excuse tendered by petitioner for his failure previously to present his contentions . . . is the claimed ineffectiveness of his prior counsel both at trial and during the prior habeas corpus proceedings." *Id.*, at 1304. The court rejected the ineffectiveness of counsel claim and held that the district court did not err in failing to grant the relief sought. *Id.*

Subsequently, the *en banc* court met and by an evenly-divided vote, denied the prisoner's request for a rehearing *en banc*. On application for stay, however, the United States Supreme Court granted Stephens' application, pend-

ing the decision in *Spencer*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983).

This Court declines to grant Petitioner a stay on this claim under Rule 9(b). In both his first state and first federal habeas corpus petitions he alleged "arbitrariness and capriciousness" in the administration of the death penalty. He did not raise the "discrimination" claim regarding imposition of the death penalty, however, which he now seeks to raise in a successive petition.

It is clear to this Court that with little more than mere reference to the Baldus Study, Petitioner is attempting to slip in under the *McCleskey-Ross* and *Spencer* umbrella. Under the panel opinion above, the claim is dismissed as an abuse of writ.

G. *Assistance of Counsel*

The Court is troubled by the virtually automatic claim, in habeas petitions, to ineffective assistance of counsel. Since this petition was filed, both habeas counsel have submitted affidavits emphasizing their personal difficulties at the time of the earlier habeas petitions. In addition, the trial court counsel in this case has been attacked as ineffective. Attorneys here turned against themselves as well as each other. Omitted claims are explained away by the incompetence of one or two or all three counsel in this case. The claim itself becomes suspect with each instance of overuse.

In the first petition, this Court found an earlier ineffective assistance of counsel claim to be without merit. *Blake v. Zant*, at 809. Although Petitioner's proposed amendments alleged other instances of ineffective assist-

ance, *see, e.g.*, Petitioner's Appendix (D) (failure to challenge grand jury), no claims were raised concerning ineffective assistance at sentencing. It will not be considered in this successive claim.

H. *Sentencing Judge's Responsibility*

In his motion for declaratory judgment, Petitioner argued that the sentencing judge, relying on the probability of appellate relief, took less than full responsibility for his sentencing decision. The claim, which is suspect on its face, was denied at the state trial court level and on appeal. 239 Ga. 67 (1977). It was not raised in the initial petition before this Court, although it was raised in an amendment. No good reason has been shown why it could not be raised in the first petition and it is thus denied. Additionally, although the claim was not presented to the Eleventh Circuit, its conclusions regarding the sentencing proceeding in the latest panel decision suggests that there is little merit to this claim.

All other claims are DENIED.

To summarize, the application for Stay is DENIED, as is the successive habeas petition. Certification for probable cause to appeal is GRANTED. Finally, Petitioner's motion to proceed *in forma pauperis* is GRANTED.

SO ORDERED, this 22nd day of May, 1984.

/s/ B. Avant Edenfield
Judge, United States District Court
Southern District of Georgia

KRAVITCH, Circuit Judge, dissenting:

By adopting the district court's order, the majority holds that Moore's second habeas petition constitutes an

abuse of the writ and therefore precludes him from litigating his claims in federal court. Under the precedents of the Supreme Court and this circuit, however, at least two of Moore's claims fall outside the scope of the abuse of the writ doctrine.[1] In holding the contrary, the majority expands the abuse of the writ doctrine in an unwarranted manner. I respectfully dissent.

I. *The Abuse of the Writ Doctrine*

In *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1962), the Supreme Court stated that a successive application for habeas relief raising claims not previously raised or, if raised, not adjudicated on the merits may be avoided only if there has been an abuse of the writ. *Id.* at 17, 83 S.Ct. at 1078. It is well settled that a successive petition presenting new claims may not be dismissed as an abuse unless the previous omission of these claims resulted from "(1) the intentional withholding or intentional abandonment of those issues on the initial petition or (2) inexcusable neglect." *Stephens v. Kemp*, 721 F.2d 1300, 1303 (11th Cir.), *granted*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983); *see Potts v. Zant*, 638 F.2d 727, 741 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981). Similarly, whether a petition presenting claims previously raised, but not adjudicated, constitutes an abuse depends upon whether the petitioner's intentional abandonment or inexcusable neglect precluded the original habeas court from reaching

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1. These claims concern the presentencing report relied upon by the sentencing court. I agree with the majority that Moore's other claims constitute an abuse of the writ.

the merits. Moreover, whether intentional abandonment or inexcusable neglect has occurred "must be tested under equitable principles," *Potts,* 638 F.2d at 743, that is, "the equities of the situation and the conduct of petitioner are relevant to the determination of whether an abuse has occurred," *id.* at 741.

Also important in determining whether there has been an abuse is the underlying purpose of the doctrine. In this regard, the former Fifth Circuit observed, "The principle behind Rule 9(b) is to dismiss those petitions that constitute 'needless piecemeal litigation' or whose 'purpose is to vex, harass, or delay.' " *Haley v. Estelle,* 632 F.2d 1273, 1275 (5th Cir.1980) (quoting *Sanders,* 373 U.S. at 18, 83 S.Ct. at 1078).

Attention to these considerations when applying the already narrow standards articulated above promotes flexibility and ensures that "[t]he 'abuse of the Writ' doctrine is of rare and extraordinary application." *Paprskar v. Estelle,* 612 F.2d 1003, 1007 (5th Cir.), *cert. denied,* 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980). In this case, however, the majority not only extends the applicable standards, but also disregards the relevant equitable considerations. The result is an overly broad and excessively rigid application of the doctrine.

II. *The Claims Raised in the Proposed Amendment to the Original Petition*

In the petition before us, Moore challenges the presentence report on which the sentencing judge relied as containing substantial inaccuracies. Citing *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir.1982), *modified,* 706 F.2d 311, *cert. denied,* — U.S. —, —, 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698 (1983), he argues that he was unconstitutionally denied an adequate opportunity to examine, contest and confront the report. Moore's substitute appointed counsel had attempted to raise these issues in the initial federal petition by way of amendment proffered while the proceeding was pending, seven months prior to the district court's ruling. Moore had raised the claims in his state habeas proceeding, but failed to assert them in the original federal petition. Though granting habeas relief on two other grounds,[2] the district court refused to allow the amendment, and a panel of this court upheld the refusal on Moore's cross appeal as not constituting an abuse of discretion. *Moore v. Balkcom,* 716 F.2d 1511, 1527 (11th Cir.1983), *modified,* 722 F.2d 629.

Moore thus has attempted to challenge the presentencing report twice in federal court: once by amendment to his initial federal petition and again in this his second federal petition. It is undisputed that the matter of alleged inaccuracies in the presentencing report and the constitutional claims arising therefrom have not been decided on the merits by a federal court. Indeed, in the order under review, the district court, while finding that the petition

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2. The district court had granted relief because it found: (1) the death penalty in this case "shocked the conscience" and thus the Georgia Supreme Court had erred in performing its statutory duty to conduct a proportionality review, and (2) the trial court had improperly relied on a non-statutory aggravating circumstance. A panel of this court reversed on both grounds. *Moore v. Balkcom,* 716 F.2d 1511 (11th Cir. 1983), *modified,* 722 F.2d 629.

was an abuse of the writ, granted a certificate of probable cause, stating:

> Petitioner in this case has raised a sufficient question for this Court to hesitate, for if Attorney Pierce did fail to scrutinize the report, then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information. Where the interests of justice so require, such a claim should be entertained. It was a similar hesitation that caused Justice O'Connor in *Eddings* to conclude that "[b]ecause of [sic] the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." 455 U.S. 104, 117 n., 102 S.Ct. 869, 878 n., 71 L.E.2d 1.
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> Unlike *Washington*, it is arguable in this case that the corrected information "would [not] barely have altered the sentencing profile presented to the sentencing judge." *Id.*, at —, 104 S.Ct. at 2071.

Given Moore's attempt to amend his initial federal petition while his claims were still pending before the district court and his cross appeal of the denial of leave to amend, I fail to see how Moore's actions can be properly characterized as an abuse of the writ. Viewing, as does the majority, the successive petition as raising the *Gardner* and *Proffitt* claims for the first time in federal court, I conclude that the omission of these claims may not be attributed to intentional withholding or inexcusable neglect, for it is evident that Moore actively sought to have the district court address the claims during the pendency of his first habeas proceeding. In other words, Moore's attempt to amend tends to negate any inference that he deliberately

or inexcusably omitted the claims from his initial submission to the district court.[3]

To the extent that Moore's atempt to amend, albeit unsuccessful, served to present the *Gardner* and *Proffitt* claims to the district court, the successive peition is perhaps best viewed as raising claims previously raised, but not adjudicated on the merits. If so, the crucial issue is whether the district court's failure to reach the merits is directly attributable to Moore's intentional abandonment or inexcusable neglect. Moore gave the district court the opportunity, indeed urged the district court, to decide the claims, but the court declined to do so. The petitioner should not be faulted at this stage for the district court's exercise of its discretion. *See Moore*, 716 F.2d at 1572.

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3. The Ninth Circuit has noted in the context of a petitioner attempting to amend his petition to include an unexhausted claim that, "[the petitioner's] attempt to amend his petition (which negates any inference that [the petitioner] was deliberately withholding the issue) . . . convinces us that [the petitioner] would not be barred by the abuse-of-the-writ doctrine from raising the issue in a subsequent federal habeas petition. . . ." *Powell v. Spalding*, 679 F.2d 163, 165 n. 2 (9th Cir.1982). The Supreme Court is evenly divided over whether unexhausted issues later resubmitted would constitute an abuse of the writ. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 1213 n. *, 71 L.Ed.2d 379 (1982) (Brennan, J., concurring in part and dissenting in part).

This petitioner's attempt to amend presents a far more compeling case for negating an inference of deliberate withholding. Whereas a petitioner in the exhaustion situation under *Lundy* must amend to *withdraw* the unexhausted claims and then later attempt to have them decided in a successive petition, here the petitioner's proffered amendment was for the express purpose of *raising* the issues so that the district court could address all of his claims in one proceeding.

A finding of abuse under these circumstances is inconsistent with equitable principles and the underlying purpose of the doctrine. Except for his failure to include the *Gardner* and *Proffitt* claims in the document which initiated his first habeas proceeding, Moore did all he could to have the claims heard by the first habeas court. Accordingly, this is not an instance of "needless piecemeal litigation" nor is the purpose of the present petition "to vex, harass, or delay." Rather, having sought in vain to have his claims litigated in a single proceeding, Moore now seeks a decision on the merits regarding those claims which the district court earlier refused to address. Because in my view no abuse of the writ has occurred, I would reverse and remand for a decision on the merits.

III. *The New Law Claim*

Moore raises for the first time a claim based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981),[4] alleging that the Probation Officer who compiled the presentencing report violated Moore's fifth amendment rights by not reading him a *Miranda* warning before the interview. The district court dismissed the

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4. Moore also alleges that he has a new law claim based on our decision in *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified* 706 F.2d 311 (1983), *cert. denied*, — U.S. —, — 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698 (1983). In *Proffitt*, we held that the sixth amendment right of confrontation and cross examination extended to witnesses in capital sentencing proceedings. 685 F.2d at 1251-55. Because part of Moore's argument in his first state habeas proceeding and his attempted amendment was that he was not allowed to examine and contest the presentence report, I would treat this claim as one already raised but not adjudicated, *see supra* Part II.

claim as constituting an abuse of the writ, finding that Moore's failure to raise the claim in his first federal petition was unjustifiable because the holding in *Smith* was a foreseeable development in the law. I am troubled by the majority's endorsement of the district court's analysis for a number of reasons.

First, in reaching its conclusion, the district court by its own admission adopted a new standard for judging whether the omission of a "new law" claim is justifiable. Reasoning that our prior abuse of the writ cases "*may* have had their vitality weakened by recent Supreme Court cases concerning exhaustion," (emphasis added) the court proceeded to hold that new law claims are to be judged by the standard outlined in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), a procedural default case. Hence, the court found the relevant question to be whether "the tools" necessary to anticipate the change in the law were available. The district court also embraced the holding of the recent Fifth Circuit en banc decision in *Jones v. Estelle*, 722 F.2d 159 (5th Cir.1983), which held in part that a petitioner who was represented by counsel is held accountable to a higher standard in justifying the omission of a claim from a prior habeas petition. *Id.* at 167.

However accurate the district court's predictions as to the future validity of our prior abuse of the writ cases it is not for either the district court or this panel to overrule precedent. Such abandonment of prior authority can only be accomplished by this court sitting en banc or by the Supreme Court. Indeed, the Fifth Circuit in *Jones* sat en banc in order to reverse the panel's holding, which had

applied former Fifth Circuit case law in finding that the petitioner's third petition was not an abuse of the writ. Contrary to the established practice in this circuit, a decision which necessitated en banc consideration in *Jones* has been imported into this circuit's law by a district court order and a panel ruling on a motion for an emergency stay of execution.

Moreover, without citing any direct authority from any circuit, the district court in this case took the novel step of applying the *Engle* holding to successive petitions, a step which the *Jones* majority expressly declined to address. 722 F.2d at 159 n. 5. Under the law of this circuit prior to today, a habeas court was not required to engage in an objective inquiry into whether "the basis of a constitutional claim [was] available, and other defense counsel [had] perceived and litigated that claim." *Engle*, 456 U.S. at 134, 102 S.Ct. at 1575. Instead, a subjective inquiry into the petitioner's actual awareness was necessary. As the court in *Haley* stated:

> [I]t is clear that a petitioner cannot be charged with having abused the writ of habeas corpus if, at the time of his earlier petition, he was unaware of the facts on which his newly asserted claims are based, or was unaware that those facts constituted a basis for which federal habeas corpus relief could be granted.

632 F.2d at 1275. By adopting the heightened "cause" standard developed by the *Engle* Court in the procedural default context for evaluating new law claims in successive petitions, the majority significantly modifies our present abuse of the writ case law. Whatever the wisdom of such a drastic step, it is a matter inappropriate for a panel

of this court to decide, especially in a proceeding of an emergency nature.

For the foregoing reasons, I would also remand this claim to the district court with instructions to apply the abuse of the writ standards under existing Eleventh Circuit precedent.

IV. *Conclusion*

Unquestionably, genuine abuses of the writ must be prevented, but we must not adopt measures so broad that legitimate claims will not be heard. I fear that the majority's approach today loses sight of the fact that the doctrine "is not intended to automatically foreclose each petitioner who fails to claim every ground for relief in his first application in federal court." *Haley*, 632 F.2d at 1276.

ON PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting rehearing en banc,

IT IS ORDERED that appellant's motion to recall the mandate is GRANTED, and that appellant's execution,

presently scheduled for June 27, 1984, is STAYED pending rehearing en banc. This cause will be reheard by this Court en banc on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX B

William Neal MOORE,

Petitioner-Appellant,

v.

Walter D. ZANT, Respondent-Appellee.

No. 84-8423.

United States Court of Appeals,
Eleventh Circuit.

June 20, 1984.

Appeal from the United States District
Court for the Southern District of Georgia.

ON PETITION FOR REHEARING EN BANC

(Opinion June 4, 1984, 11th Cir., 1984, 734 F.2d 585).

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting rehearing en banc,

IT IS ORDERED that appellant's motion to recall the mandate is GRANTED, and that appellant's execution, presently scheduled for June 27, 1984, is STAYED pending rehearing en banc. This cause will be reheard by this Court en banc on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX C

William Neal MOORE,

Petitioner-Appellant,

v.

Ralph KEMP, Respondent-Appellee.

No. 84-8423

United States Court of Appeals,
Eleventh Circuit.

July 27, 1987.

John Charles Boger, New York City, for petitioner-appellant.

Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, Chief Judge,

GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

GODBOLD, Circuit Judge:

Petitioner Moore raised in a second federal habeas petition new grounds not raised in his first federal petition and allegedly based upon new principles of law laid down since the first federal petition. The major decision for the en banc court concerns the determination of whether this was an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 Cases.

Moore was convicted of murder in Georgia after a plea of guilty and sentenced to death. He has filed a first state petition for habeas, followed by a first federal petition, a second state petition, and now the second federal petition. In the present case the district court denied all nine grounds asserted on the basis of abuse of the writ. A divided panel of this court affirmed and adopted the district court opinion. *Moore v. Zant*, 734 F.2d 585 (11th Cir.1984). Judge Kravitch dissented. 734 F.2d at 601. We set out in the margin a chronology of the key events in this litigation.[1]

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1. 1974: Plea of guilty and sentence; affirmed on merits by Georgia Supreme Court. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975) (per curiam), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976).

January 1978: First state habeas petition filed. Relief denied July 13, 1978, after evidentiary hearing.

November 22, 1978: Federal habeas petition filed.

March 19, 1979: Habeas counsel moved to withdraw.

April 1979: Petitioner pro se moved to amend to assert several new grounds, including ineffectiveness of counsel.

June 18, 1979: Hearing before magistrate. Petitioner asserted that his attorney referred to conflict between him and Moore on whether ineffective counsel claim should be asserted and magistrate refused to take evidence on issue or to permit petitioner to file an affidavit.

September 30, 1980: New habeas counsel Hicks retained.

October 1, 1980: Motion to amend by new counsel Hicks to add five grounds. State objected to proposed amendments by petitioner and Hicks.

April 8, 1981: Present (third) habeas counsel retained.

April 29, 1981: District court denied relief from conviction, granted writ as to sentence on ground of no proportionality

(Continued on following page)

Five issues are pressed before the en banc court:

(1) The state failed to advise Moore of his right to remain silent or of his right to counsel prior to or during a presentence interview conducted by a probation officer after conviction and before sentencing, a claim based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

(2) The state denied Moore the right to confront and cross-examine witnesses whose hearsay testimony was considered in the presentence report, a claim based on *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 509, 78 L.Ed.2d 698 (1983).

(3) Neither Moore nor his counsel was afforded adequate opportunity to review the presentence report prior to the sentencing proceeding, in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

(Continued from previous page)

review by Georgia Supreme court. The court also denied both motions to amend (by Moore, *pro se*, and by Hicks). *Blake v. Zant*, 513 F.Supp. 772, 803-18 (S.D.Ga.1981).

1981-1983: Appeal by state to Eleventh Circuit. Moore cross-appealed on refusal to allow his *pro se* amendment. Granting of writ reversed and relief denied on cross-appeal on ground of no abuse of discretion. *Moore v. Balkcom*, 716 F.2d 1511 (11th Cir.1983), *cert. denied*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984).

May 11, 1984: Second state habeas petition filed. Dismissed without hearing. Review denied by Georgia Supreme Court.

May 18, 1984: Second federal habeas petition filed. District court denied relief May 22 on abuse of writ grounds.

June 4, 1984: A panel of the Eleventh Circuit affirmed on district court opinion. *Moore v. Zant*, 734 F.2d 585 (11th Cir.1984).

(4) Ineffectiveness of trial counsel at sentencing phase.

(5) Racially discriminatory application of the death penalty in the State of Georgia.[2]

I. The *Estelle v. Smith* claim

In his second state petition, filed in 1984, Moore raised claim (1) of the list above—the failure to advise him of his right to remain silent and of his right to counsel prior to a presentence interview by a probation officer after conviction and before sentencing. The officer interviewed Moore in connection with the preparation of a presentence

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2. The district court also rejected four other grounds for relief in Moore's federal habeas corpus petition:

> 2) Petitioner was sentenced on the basis of materially false and misleading information contained in the presentence report.
>
> . . . .
>
> 5) The presentence report defects prevented petitioner from obtaining a meaningful appellate review in violation of his [sic] Eighth and Fourteenth Amendments.
>
> 6) Petitioner's death sentence is excessive and disproportionate under the Eighth and Fourteenth Amendments since it was imposed despite his repeated and uncontradicted denial of any intent to kill the victim.
>
> . . . .
>
> 9) Since the sentencing judge expressly relied on the prospect of appellate review or the United States Supreme Court's invalidation of Georgia's capital statutes, [he] attached diminished consequences to the sentence of death as imposed and thus took less than full responsibility for the sentencing decision in violation of petitioner's Eighth and Fourteenth Amendment right.

734 F.2d at 589 (district court opinion).

report that was introduced by the state at the sentencing phase of Moore's trial.

This claim was based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), which was not decided until three weeks after Moore's first federal petition was decided by the district court.[3] In *Smith* a court ordered the psychiatric examination of Smith, a Texas state prisoner, while he was in custody. Smith was not advised of his right to remain silent when examined by the psychiatrist nor was he told that any statement he made to the psychiatrist could be used against him at the ensuing sentencing hearing. The Supreme Court held that admission of the interrogating doctor's testimony at the sentencing phase of Smith's trial violated his fifth amendment privilege against self-incrimination and his sixth amendment right to counsel as well. Moore seeks to apply *Smith* to the presentence interview conducted of him by a probation officer after his conviction but before his sentencing.

The state court denied the *Smith* claim. First, it held that Moore had previously litigated the issue unsuccessfully. The court did not mean this literally but rather, as its opinion explains, Moore had known the facts concerning his interview by the probation officer and in the first state habeas had raised the issue of opportunity to comment on

3. The district court decision granting relief in *Smith* was decided December 10, 1977, shortly after Moore's first state petition was filed. The Fifth Circuit affirmed September 13, 1979, more than a year after the first federal petition was filed but more than a year before the proposed Hicks amendment was filed. See n. 1, *supra*. The decision by the Supreme Court in *Smith* was entered May 18, 1981, three weeks after the district court ruled on the first federal petition.

and explain the report, and therefore, he could have raised the question of failure to advise him of his right to remain silent and his right to counsel; having failed to do so he had "waived the right to do so in this successive habeas petition." Second, the court held that *Smith* did not establish a new constitutional principle because the Supreme Court had relied on its prior decisions in *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

This issue was then presented in the second federal petition, filed immediately after the second state petition was denied, raising for the first time in the federal court a principle of law alleged to be new and to have been laid down since the first federal petition, and giving rise to an abuse of the writ issue under Rule 9(b). Four days after filing, the district court denied the claim on abuse of the writ grounds.[4] We hold that the *Smith* claim in the second petition was not properly dismissed under Rule 9(b) and remand for reconsideration of this issue on the merits.

Absent deliberate withholding or intentional abandonment of a claim in the first federal petition, the inquiry into whether a petitioner has abused the writ in raising a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal applica-

4. It impliedly rejected the state court's statement that Moore had previously litigated the *Smith* claim and proceeded directly to the conclusion that *Smith* was not "new law."

tion.[5] Rule 9(b) allows dismissal of a claim when "the failure of the petitioner to assert those grounds in the prior petition constituted an abuse of the writ." *Accord* 28 U.S.C. § 2244. The focus on petitioner's conduct is mandated by the basic purpose of the abuse of the writ doctrine—to enforce the "equitable principle[ ] . . . that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Sanders v. U.S.*, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963). An evaluation of a petitioner's conduct in omitting a claim from his first petition necessarily hinges on the petitioner's awareness of the factual and legal bases of the claim when the first petition was filed.[6] *See Haley v. Estelle*, 632 F.2d 1273, 1275 (5th Cir.1980) (a petitioner may assert in a second petition a claim based on facts or legal theories about which he had no knowledge at the time of his prior habeas petition).

Moore was represented by counsel at the time his first habeas corpus petition was filed. He is chargeable with counsel's actual awareness of the factual and legal bases

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5. Of course, the court may not have to consider whether a new law claim on a successive petition is abusive if it determines that the new claim is wholly without merit. The Court in *Sanders* provided that the abuse of the writ rules "are not operative in cases where the second or successive application is shown, on the basis of the application, files and records of the case alone, conclusively to be without merit." *Sanders v. U.S.*, 373 U.S. 1, 15, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 1963). This policy is incorporated into Rule 4 of the Rules Governing Section 2254 Cases (authorizing summary dismissal "[i]f it plainly appears from the face of and any exhibits annexed to it that the petitioner is not entitled to relief").

6. Awareness of the *factual* basis for a claim at the time of a prior federal habeas petition is a question not before us.

of the claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition. *Cf. Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir.1985) (finding abuse where "[e]ach of the claims that Daniels has asserted in this proceeding is a claim of which competent habeas counsel would have been aware at the time Daniels' prior federal petition was filed in 1980").

We turn next to the state of the law in November 1978 —the time of Moore's first federal petition—with respect to the state's failure to advise Moore of his fifth amendment right to remain silent and of his sixth amendment right to counsel prior to or during the presentence interview conducted by a probation officer after conviction and before sentencing. We hold that in November 1978, two and a half years before *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), reasonably competent counsel preparing the first petition could not reasonably have been expected to foresee the fifth and sixth amendment implications of Moore's presentence interview. In particular, counsel is not chargeable with an anticipation of the potential intersection of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) with the sentencing phase of a bifurcated Georgia capital murder trial. As a result, Moore's failure to raise the *Miranda* claim in his first habeas corpus petition was not an abuse of the writ.

The failure of Moore and counsel in 1978 to anticipate the application of *Miranda* in the context of the sentencing phase of Georgia's bifurcated capital proceeding is reasonable in light of the lack of clear guidance in 1978 with

respect to constitutional protections that might attach to the sentencing phase. Georgia's bifurcated death penalty procedure had been approved by the Supreme Court in 1976. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It was not immediately obvious, however, that the constitutional protections normally accorded to a defendant's merits trial would be applied to sentencing phases in general, or Georgia's in particular, much less that *Miranda* might be so applied. In 1982, four years after the 1978 date as of which we are assaying what Moore and his counsel reasonably should have foreseen, the Eleventh Circuit noted that "[t]raditionally, sentencing hearings have not been accorded the significance of the guilt-determination portion of the trial." *Proffitt v. Wainwright*, 685 F.2d 1227, 1252 (11th Cir.1982), *modified* 706 F.2d 311, *cert. denied*, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983). This court went on to say in *Proffitt* that in light of recent Supreme Court decisions, "[t]he view, *once prevalent*, that the procedural requirements applicable to capital sentencing are no more rigorous than those governing noncapital sentencing decisions . . . is no longer valid." *Id.* at 1253 (emphasis added).[7]

Further evidence of a lack of clear guidance in 1978 with respect to sentencing phases is revealed by looking at the cases on which the Supreme Court relied in its opinion in *Estelle v. Smith*. The Court, in 1981, cited three cases in support of the application of certain constitutional guarantees to the Texas penalty phase: *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); and *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Of these, *Presnell* (decided November 6, 1978) and *Green* (decided May 29, 1979) were handed down by the Supreme Court after Moore's first federal habeas petition was filed in 1978. The statement in *Gardner*, a year before Moore's first federal petition, that "the sentencing process, as well as the trial itself, must satisfy the Due Process Clause" appears in a plurality opinion of three justices. 430 U.S. at 358, 97 S.Ct. at 1204. The concurring opinions do not clearly ascribe to this position. *See id.* at 364, 97 S.Ct. at 1207 (White, J., concurring) ("I see no reason to address in this case the possible application to sentencing proceedings—in death or other cases—of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered in this case.")[8]

7. See Part II, *infra*, for a discussion of Moore's *Proffitt* claim.

When Moore filed his first federal petition, therefore, the extent to which constitutional protections for criminal defendants would apply to capital sentencing proceedings was not clear—the full panoply of protections, or less than the full array, and if less, what was to be included? *Cf. Proffitt*, in *1982*: "[a]lthough the [Supreme] Court has held capital sentencing proceedings must meet certain procedural requirements, it *has not yet delineated* the exact scope of constitutional procedural protection to which capital defendants are entitled." 685 F.2d at 1253 (emphasis added). In 1980, two years after Moore filed his first petition, the State of Texas was arguing before the United

8. The other concurrences did not consider the issue.

States Supreme Court in *Smith* that Smith "was not entitled to the protection of the Fifth Amendment because [the] testimony was used only to determine punishment after conviction, not to establish guilt" and that "the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial." *Smith*, 451 U.S. at 462, 101 S.Ct. at 1872.

Next, we analyze the decision in *Smith* with particularity, to see what light it sheds on the question of the foreseeability to counsel in 1978 of the possibility that *Miranda* would have plenary applicability to the sentencing phase of a Georgia-type capital murder trial. In *Smith* the Court found a violation of Smith's fifth and sixth amendment rights where the State of Texas introduced, at the sentencing phase of his capital murder trial, the testimony of a psychiatrist who, pursuant to court order, had interviewed him to determine his competency to stand trial. The Court held that in light of *Miranda* the psychiatrist's testimony could not be used at the sentencing phase because Smith had not been given *Miranda* warnings. In *Gray v. Lucas*, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982) the Fifth Circuit spoke to whether Gray's counsel should have foreseen the circuit's own opinion in *Smith* (handed down in 1979, a year and a half before the Supreme Court decided *Smith*): "Because our opinion in *Smith* was delivered three years after Gray's trial, we do not fault Gray's counsel for not anticipating our holding."[9]

Analysis of why Moore and his first habeas counsel, in 1978, could not reasonably have been expected to antici-

9. The Fifth Circuit's opinion in *Smith* could not have given Moore's counsel any guidance, for it came a year after Moore's first federal petition.

pate a *Smith* type[10] claim requires understanding the importance to the *Smith* decision of the special nature of a Texas sentencing proceeding in a bifurcated capital trial.[11] This is seen in the Fifth Circuit's analysis of *Smith* in *Battie v. Estelle*, 655 F.2d 692 (5th Cir. Sept. 11, 1981), a decision binding on our court. In connection with the issue of the applicability of *Miranda* to the sentencing phase of the trial in *Smith*,[12] *Battie* said:

10. Because we hold that Moore's counsel is not chargeable with an awareness of the *Smith* principle, we need not decide whether he would also have been expected to discern the possible application of the *Smith* principle to investigations conducted by a probation officer, who is in a sense a representative of and officer of the court, having a specialized function in the processes of the court, instead of a psychiatrist, who has a different function but is not an arm of the court itself.

11. It is by no means clear, even now, that *Smith* would apply in non-capital cases where a trial judge has wide discretion to consider information in imposing sentence. *See Baumann v. U.S.* 692 F.2d 565, 576 (9th Cir.1982) (distinguishing *Smith* as involving a bifurcated death proceeding where discretion on sentencing is channelled whereas *Baumann* involved a "routine presentence interview[] conducted for the benefit of a district judge in the exercise of his substantial discretion at sentencing").

12. *Battie* also considered a different aspect of the relationship of *Smith* to the state of the law before *Smith* was announced. The Fifth Circuit held that the ruling of *Smith* that the pretrial psychiatric competency examination was an official custodial interrogation of the type protected by *Miranda* would apply retroactively because it did not announce a new principle of constitutional law. This does not speak to the issue before us, namely whether the intersection in *Smith* of *Miranda* and capital sentencing proceedings conducted under the Georgia statutory scheme should have been anticipated by counsel in 1978.

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> *Smith* only held the fifth amendment privilege applicable to the sentencing stage of a capital trial in Texas because the State of Texas must prove a capital defendant's future dangerousness as an issue separate and distinct from proof of his guilt. The applicability of the privilege to mandatory or discretionary sentencing procedures not requiring proof of such an additional prerequisite to impose a criminal punishment raises different questions not necessarily resolved by *Smith*.

655 F.2d at 698 n. 10. The Georgia statute under which Moore was sentenced requires only consideration of aggravating and mitigating circumstances and does not require any proof of future dangerousness. *See* O.C.G.A. § 17-10-30. It would be anomalous for us to charge Moore's counsel with an awareness in 1978 of a proposition that remained unclear to the Fifth Circuit almost three years later (and four months after it had the benefit of *Smith*),

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The Eleventh Circuit has pointed out that a determination of the retroactivity of a decision is a different inquiry than the question of what counsel should have foreseen before the decision was handed down. In *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir.), *cert. denied*, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984), the court observed that different answers could be given to the questions of whether *Smith* applied retroactively and whether counsel should have anticipated *Smith*. The court contrasted *Battie* with the holding of the new Fifth Circuit in *Gray v. Lucas*, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983) that counsel was not deficient in failing to anticipate *Smith*. *Alvord*, 725 F.2d at 1293. *See also Francois v. Wainwright*, 741 F.2d 1275, 1285 (11th Cir.1984) (the failure to raise an issue that only later gains judicial recognition does not render counsel ineffective); *Sullivan v. Wainwright*, 695 F.2d 1306, 1309 (11th Cir.), *cert. denied*, 464 U.S. 922, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983) (same).

namely that *Miranda* protections would be applicable to the sentencing phase of a Georgia-type death penalty proceeding.

The Supreme Court has told us that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *accord Smith v. Murray*, 477 U.S. 527, —, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). An attorney's failure in 1978 to recognize the potential intersection of *Miranda* and Georgia capital sentencing proceedings, does not cause his performance to fall outside of "the wide range of professionally competent assistance." *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Consequently, we cannot charge Moore with the knowledge of the legal basis of this claim at the time of his first petition and therefore hold that his conduct in omitting the claim was an not abuse of the writ warranting dismissal under Rule 9(b). Absent such an abuse of the remedy, the federal courts should hear the merits of the claim on habeas corpus. Accordingly we remand to the district court for a consideration of the merits of Moore's claim regarding his presentence interview.

II. *Proffitt v. Wainwright* claim

In Moore's second habeas petition he raised another "new law" claim. He alleged that the state denied him the right to confront and cross-examine witnesses whose hearsay testimony was considered in the presentence report. This claim is based on *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982); *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 509, 78 L.Ed.2d 698

(1983), which was decided by the Eleventh Circuit on September 10, 1982, five months after the district court decided the first federal petition. In *Proffitt* this court recognized the specific constitutional right accorded a capital defendant to cross-examine a psychiatrist whose report of a presentence examination of the defendant was considered by the trial court in its sentencing decision. *Id.* at 1251-55. Moore seeks to apply this case to witnesses whose statements were included in his presentence report.

The state habeas court denied the claim, holding that there was no new factual basis for the claim and that *Proffitt* did not establish a new constitutional principle because the Eleventh Circuit had relied "on the landmark decisions of the Supreme Court of the United States in *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965) and *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)." In this second federal habeas petition the district court repected the *Proffitt* claim under the same abuse analysis that it applied to the *Estelle v. Smith* claim. As with the *Smith* claim, we cannot charge Moore with the knowledge of the legal basis of this claim at the time of his first petition and we hold that his conduct in omitting the claim was not an abuse of the writ.

The new law aspect of *Proffitt* arises from the court's resolution of the question of "[w]hether the right to cross-examine adverse witnesses extends to capital sentencing proceedings." 685 F.2d at 1253. The court extended the cross-examination principles of *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *California v. Green,* 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26

L.Ed.2d 489 (1970); *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965) to the penalty phase of capital proceedings. As we concluded with respect to the *Estelle v. Smith* claim, the failure of Moore and his counsel in 1978 to anticipate this extension does not render the omission of the claim from the first petition an abuse of the writ. Accordingly we reverse the district court's dismissal of the *Proffitt* claim on abuse grounds and remand for reconsideration of the merits of the claim.

III. The Gardner v. Florida claim

The second federal petition alleged that neither Moore nor his counsel had been given a meaningful opportunity to review, correct, or supplement the presentence report, in violation of *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). *Gardner* was decided in 1977; therefore this is not claim based on alleged "new law" declared since the first federal petition.

This claim comes to us with an unusual procedural history. It was originally raised in Moore's first state habeas corpus petition in 1978. The first federal petition, filed in the fall of 1978, did not include this claim. Moore sought to raise the claim by amendment to the petition in October 1980, just after he retained new counsel. The district court refused to grant leave to amend the petition, and the Eleventh Circuit affirmed:

> The district court found that petitioner had been represented by counsel at all times. Counsel explicitly referred to this issue in the original habeas petition filed approximately two years before the proposed amendment. We cannot say that the district court abused its discretion in denying the proposed amend-

> ment in this case where counsel apparently considered and rejected the proposed argument two years before filing the proposed amendment.[15]

716 F.2d at 1527 & n. 15. Moore raised the issue again in his second federal petition, and the district court denied the claim as an abuse of the writ. 734 F.2d at 598 (district court opinion).

Rule 9(b) creates two categories of claims in second (or successive) habeas petitions. The first prong concerns cases in which the same ground has previously been presented and decided against petitioner in a prior determination on the merits. Moore's claim of inadequate opportunity to review the presentence report was never determined on the merits. It is therefore a second prong, or new, claim that must be entertained on the merits unless the failure to raise it in the first petition was an abuse of the writ.

Moore argues that the failure to raise this claim in the first petition cannot be an abuse of the writ in light of Moore's attempt to add the claim by amendment. Although Moore did attempt to raise this claim before the first federal habeas court, the procedural insufficiency of that attempt has already been litigated, before that court on a motion to amend the petition and before this court on Moore's cross-appeal of the denial of the motion to amend.

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[15]Mr. James C. Bonner who had represented petitioner at the prior state habeas petition, filed the initial habeas petition in federal court. At the time the proposed amendment was filed, Ms. H. Diana Hicks represented Moore. Since Moore was represented at all time by counsel, though not by the same individual, we cannot say that the district court abused its discretion in refusing to allow the amendment. . . .

716 F.2d at 1527. We are thus called upon to determine the effect on a second federal habeas corpus petition of a failure to raise a claim adequately on the first petition. On the one hand, the denial of leave to amend cannot stand as a conclusive determination that the failure to raise the claim in the first petition was an abuse of the writ, because the standards applied by a district court in considering amendment are coterminous with the standards for abuse of the writ. *Cf. Paprskar v. Estelle,* 612 F.2d 1003 (5th Cir.), *cert. denied,* 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980) (dismissal of unexhausted claims in first petition does not bar as an abuse the assertion of those claims on a second petition). On the other hand, the mere attempt to raise the claim by amendment in one habeas proceeding cannot by itself be a defense to an assertion of abuse in a subsequent proceeding. It would be anomalous if a petitioner who deliberately and strategically withheld a claim from his petition, *cf. Young v. Kemp,* 758 F.2d 514, 516 (11th Cir.1985), could insulate that conduct from a later abuse determination by the simple expedient of an untimely attempt to amend the first petition. This result would frustrate Rule 9(b)'s goal of having all claims raised and determined in one petition.

The fact that Moore's *Gardner* claim was included in a proposed amendment to a first petition and that the amendment was properly denied is at most a factor to be considered in answering the question of whether that claim may be denied in this petition on abuse of the writ grounds. The appropriate inquiry in the subsequent action is whether the failure to bring the claim properly in the first action constituted an abuse of the writ.

We cannot say that the district court, in ruling on Moore's second petition, erred in finding that the failure to include this claim in the first petition was an abuse of the writ.[13] Moore raised the claim in his first state habeas petition, *see* 734 F.2d at 597 (district court opinion), and his original federal habeas petition made explicit reference to the presentence report issue. *See Moore v. Balkcom*, 716 F.2d 1511, 1527 (11th Cir.1983). He failed even to attempt to raise the claim for almost two years after the first petition was filed. This extended failure to raise a claim previously raised in the state courts in analogous to the situation in *Antone v. Dugger*, 465 U.S. 200, 104 S.Ct. 962, 79 L.Ed.2d 147 (1984) (per curiam). In that case the Supreme Court upheld a finding of abuse where the "applicant had presented each of these claims to the state courts before the first petition for habeas was filed (and, indeed, the substance of these claims may have been presented in the first habeas petition) . . . ." *Id.*, at 206, 104 S.Ct. at 965.

Even where abuse is found, however, a federal court should not dismiss, under Rule 9, a claim in a successive petition if the "ends of justice" require consideration of the claim on the merits. *See Potts v. Zant*, 638 F.2d 727, 751-52 (5th Cir. Unit B), *cert. denied*, 454 U.S. 877, 102

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13. The district court stated that

> Because Petitioner himself could have raised the claim on direct appeal to the Georgia Supreme Court, because he did raise it in his first state habeas petition, and because he failed to properly present the issues in his federal petition, this Court is warranted under the "abuse of the writ" doctrine to deny [this] claim.

734 F.2d at 598 (district court opinion).

S.Ct. 357, 70 L.Ed.2d 187 (1981); *Sanders v. U.S.*, 373 U.S. 1, 18-19, 83 S.Ct. 1068, 1078-79, 10 L.Ed.2d 148 (1963). The district court in *Moore* acknowledged this principle, noting that "[w]here the interests of justice so require, such a claim should be entertained," 734 F.2d at 597. The court apparently concluded, however, that the ends of justice did not require a consideration of Moore's *Gardner* claim on the merits because petitioner had had "repeated opportunities to litigate this issue." *Id.*

It is not certain what standards should guide a district court in determining whether the "ends of justice" require the consideration on the merits of an otherwise dismissable successive habeas petition. In *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), a four-justice plurality of the Supreme Court suggested that the ends of justice will demand consideration of the merits of claims only where there is "a colorable showing of factual innocence." *Id.* at 2627. We need not decide at this time whether a colorable showing of factual innocence is a necessary condition for the application of the ends of justice exception. We merely hold that, at a minimum, the ends of justice will demand consideration of the merits of a claim on a successive petition where there is a colorable showing of factual innocence.

Some adjustment is required to apply this test, phrased as it is in terms of "innocence," to alleged constitutional errors in capital sentencing. We find some guidance in the Supreme Court's opinion in *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). In the context of alleged errors in a capital sentencing proceeding the Court in that cases ought to apply an analogous standard—that governing when fundamental principles of

justice would require the consideration of procedurally defaulted claims in the absence of a showing of cause for the default. The standard was announced in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) which held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.* at 2650.

The *Smith v. Murray* Court refused to consider a claim on the merits, finding that "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming [error in the allowance of certain testimony], its admission did not serve to pervert the jury's deliberations concerning whether *in fact* petitioner constituted a continuing threat to society." 106 S.Ct. at 2668.

The district court in the present case did not have available to it the guidance given by the Supreme Court in *Smith v. Murray*. In our consideration of whether "the alleged constitutional error [either] precluded the development of true facts [or] resulted in the admission of false ones" we are faced with a fundamental inconsistency in the decision of the district court. The court found that the ends of justice did not require consideration of the *Gardner* claim on the merits. Yet its own statements arguably require the opposite finding. The court stated that if there had been a *Gardner* violation, "then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information." The court also found that "it is arguable that the corrected information

'would [not] barely have altered the sentencing profile presented to the sentencing judge,'" that is, that corrected information would have materially altered the profile before the judge. 734 F.2d at 597 (*quoting Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Under these circumstances we vacate the denial of the *Gardner* claim and remand in order that the district court can give fresh consideration to whether the ends of justice require it to consider the merits of this claim.

IV. Ineffectiveness of trial counsel

Moore's second federal habeas petition alleges that his trial attorney rendered ineffective assistance at the sentencing phase of his trial. By a *pro se* motion to amend his first habeas petition, Moore attempted to raise the issue of ineffectiveness of counsel at the merits trial in numerous respects, set out in the margin.[14] The only reference to the sentencing phase concerned failure to transcribe petitioner's arguments concerning punishment and mitigation and aggravating circumstances.

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14. (1) Counsel's failure to investigate and challenge the composition of the grand jury; (2) failure to inform petitioner that he could challenge the composition of the grand jury; (3) failure to investigate prejudice in the county of trial and to seek a change of venue; (4) failure to request that the district attorney's closing arguments be transcribed; (5) use by the Georgia Supreme Court of unconstitutional cases in its appellate review; and (6) failure to follow up on investigation of the offense.

As with the proposed Hicks amendment discussed in the previous section, the first federal habeas court denied the motion to amend. See 513 F.Supp. at 806.

In the second federal petition Moore alleged ineffective counsel at sentencing, on numerous grounds. Moore urges that he did not withhold the issue, stating that it was omitted from the first federal petition because of differences between him and his counsel. The ineffectiveness issue, including the performance of counsel at the sentencing phase, had been examined in detail in the order denying the first state petition. Ineffectiveness at sentencing was not asserted in petitioner's *pro se* amendment or in the Hicks amendment. The court did not err in finding that it was barred under abuse of the writ principles.

V. Racially discriminatory application of death penalty in Georgia

This claim was not raised in the first state petition or the first federal petition. Petitioner has sought the benefit of the Baldus study. The district court held it was barred on abuse grounds. We do not examine this in detail because the Baldus study was rejected in *McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

AFFIRMED in part, REVERSED in part and REMANDED.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part, in which VANCE, Circuit Judge, joins:

This case comes before the en banc court as an appeal from the district court's decision to deny petitioner, William Neal Moore, a writ of habeas corpus. As the majority opinion notes, the principal issue before the court is whether the district court properly rejected Moore's petition as an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 Cases, *see* 28 U.S.C. § 2254 (1982). The

majority holds that Moore's failure to present his claims based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), and *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), did not constitute an abuse of the writ, because *Estelle v. Smith* and *Proffitt* are "new law." I respectfully dissent from these conclusions because a reasonably competent habeas attorney should have anticipated the holdings of *Estelle v. Smith* and *Proffitt*. I also dissent from the majority's disposition of petitioner's claim under *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality), because Moore had a sufficient opportunity to present this claim in his first petition and because it is patently without merit. Finally, I concur in the majority's analysis and disposition of petitioner's remaining claims.[1]

I.

On May 13, 1974, a grand jury in Jefferson County, Georgia, indicted Moore for the April 2, 1974 malice murder and armed robbery of Fredger Stapleton.[2] On June

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1. Petitioner's remaining claims concern the ineffectiveness of trial counsel during the sentencing phase of his case and the alleged racially discriminatory application of the death penalty in Georgia. The district court dismissed both of these claims as an abuse of the writ.

2. The facts underlying this case have been recounted elsewhere. *See, e.g., Blake v. Zant*, 513 F.Supp. 772, 803-04 (S.D. Ga.1981), *aff'd in part and rev'd in part sub nom. Moore v. Balkcom*, 716 F.2d 1511 (11th Cir.1983), *cert. denied*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829, 830-31 (1975), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976).

4, 1974, Moore was arraigned in the Superior Court of Jefferson County and pled guilty to both charges. Because the State sought the death penalty on the malice murder charge, Moore was entitled, under Georgia law, to have a jury determine whether that penalty, or a sentence of life imprisonment, should be imposed. He waived his right to a jury determination, electing instead to be sentenced by the court.

On July 17, 1974, the court held a bench trial on the penalty issue. From the evidence adduced by the prosecution and the defense (including a presentence report, prepared by the court's probation officer which the prosecutor had introduced into evidence without objection) the court found that Moore had committed the Stapleton murder during the course of an armed robbery, an aggravating circumstance that rendered Moore subject to the death penalty.[3] The court further found that this aggravating circumstance outweighed the mitigating circumstances present in the case, and it sentenced Moore to death.

On direct appeal, the Supreme Court of Georgia affirmed Moore's conviction and sentence. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975) (per curiam), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976). Moore thereafter moved the Superior Court of Jefferson County for a new sentencing proceeding. The court denied his motion. *See Moore v. State*, 239 Ga. 67, 235 S.E.2d 519, *cert. denied*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159

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3. See Ga.Code Ann. § 27-2534.1(b)(2) (Harrison 1978); see also *infra* note 21.

(1977).[4] In early 1978, Moore petitioned the Superior Court of Tattnall County, Georgia, for a writ of habeas corpus, presenting six grounds for relief.[5] After an evidentiary hearing, that court rejected his petition, and the Supreme Court of Georgia refused to grant him a certificate of probable cause to appeal.

On November 22, 1978, Moore sought a writ of habeas corpus in the United States District Court for the South-

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4. Moore contended that he was entitled to a new sentencing proceeding on two grounds: (1) the court had imposed the death penalty under "a mistaken belief that such sentence would never be upheld by the U.S. Supreme Court," and (2) the court, in deciding to impose the death penalty, had relied on information (contained in the probation officer's presentence report) which Moore "had no opportunity to deny or explain" (the *Gardner* claim). *See Moore v. State*, 235 S.E.2d at 519. The Supreme Court of Georgia affirmed the trial court's denial of Moore's motion for a new sentencing proceeding on the ground that a habeas corpus action was the sole avenue for such relief. *Id.*

5. In his habeas petition, Moore claimed that his conviction and sentence violated the eighth amendment proscription against cruel and unusual punishment and the due process clause of the fourteenth amendment for the following reasons: (1) his prior arrest record was presented to the sentencing judge in a presentence report "without the Petitioner or his counsel being afforded a fair opportunity to explain or rebut it" (the *Gardner* claim); (2) his direct appeal to the Supreme Court of Georgia was not properly conducted, because the prosecutor's arguments at the close of the sentencing proceeding were not transcribed and included in the record on appeal; (3) a brutal murder of an elderly couple in rural Jefferson County that occurred shortly before Moore was indicted improperly influenced the district attorney and the trial judge in Moore's case; (4) his guilty plea to malice murder was involuntary and unintelligent because he lacked specific intent to kill his victim; (5) his sentence was disproportionate, given the mitigating circumstances present in his case; and (6) he never voluntarily waived his absolute right under Georgia law, see Ga. Code Ann. § 27-1404 (1933) (current version at Ga. Code Ann. § 17-7-93 (1982)), to withdraw his two guilty pleas prior to the court's entry of judgment against him.

ern District of Georgia.[6] His petition contained four of the six claims he had asserted in his state habeas petition;[7] one of the claims Moore omitted was his *Gardner* claim—that his trial judge did not give him and his attorney an adequate opportunity to review, supplement, or correct the probation officer's presentence report before sentencing him to death. On March 6, 1979, while his petition was pending in the district court, Moore filed a pro se motion to amend his petition to add two claims not pertinent to this appeal.[8]

Moore's attorney, James C. Bonner, Jr., who had represented Moore in the state habeas court, thereafter requested and received leave to withdraw, and the district court appointed H. Diana Hicks as substitute counsel. Hicks immediately moved the court for leave to amend Moore's

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6. The discussion in the text omits reference to a federal habeas petition that Moore filed earlier in 1978 and then voluntarily dismissed without prejudice after the Supreme Court of Georgia granted a stay of his execution. That aborted petition has no relevance to this appeal.

7. Moore's federal petition contained claims two, four, five, and six of his state habeas petition. *See supra* note 5. Although his federal petition recited the facts underpinning claim one of his state habeas petition (the *Gardner* claim), it did not present that claim as a ground for relief.

8. Moore's pro se amendment alleged that his trial attorney provided him ineffective assistance of counsel because he (1) failed to investigate and challenge the composition of Moore's grand jury; (2) failed to inform Moore that he could challenge the grand jury; (3) failed to seek a change of venue for Moore's trial; and (4) failed to request that counsel's closing arguments to the sentencing judge be transcribed for review on appeal. Moore also alleged that the Supreme Court of Georgia relied on "[u]nconstitutional cases . . . in compar-i[ng his] death sentence [to prior cases]."

petition, to present his *Gardner* claim.[9] On April 29, 1981, the district court denied both the pro se motion and the Hicks motion for leave to amend, *see Blake v. Zant*, 513 F.Supp. 772, 804-06 (S.D.Ga.1981); granted the writ as to Moore's sentence on the ground that "the penalty of death is cruel and unusual as applied to him in light of the circumstances of the crime and other relevant factors," *id.* at 803; and denied all of Moore's remaining claims, *id.*

The State appealed the district court's judgment granting the writ as to Moore's sentence, and Moore cross-appealed, challenging the district court's rulings on the claims that the district court rejected and the court's refusal to permit him to amend his petition. A panel of this court reversed the grant of relief, concluding that the district court had improperly engaged in a proportionality review of Moore's sentence, *Moore v. Balkcom*, 716 F.2d 1511, 1518-19 (11th Cir.1983) (on rehearing), and affirmed the district court's rejection of his remaining challenges to his guilty pleas and death sentence, *id.* at 1527. The panel also held that the district court did not abuse its discretion in refusing to grant Moore leave to amend his petition. *Id.* The Supreme Court denied Moore's petition for a writ of certiorari. *Moore v. Balkcom*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984).

Moore thereafter returned to state court for relief, seeking a writ of habeas corpus in the Superior Court of Butts County, Georgia. His petition contained seven claims. Moore alleged that (1) the State infringed his rights under the fifth, sixth, and fourteenth amendments

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9. Hicks' proposed amendment, which was filed on October 1, 1980, included still other claims not relevant to this appeal.

when his trial judge, in deciding whether to impose the death sentence, relied on a presentence report that contained information the court's probation officer had obtained from Moore without advising him of his rights not to submit to a presentence interview and to have counsel present during the interview (the *Estelle v. Smith* claim);[10] (2) the presentence report contained inaccurate and incomplete information, in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S.104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); (3) he was denied his sixth and fourteenth amendment rights to confront the witnesses whose testimony was contained in the presentence report (the *Proffitt* claim); (4) because of the errors and ommissions contained in the presentence report, he was denied the right to meaningful appellate review, in violation of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); (5) because he lacked the specific intent to kill his victim, he was sentenced to death in violation of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); (6) the death penalty in Georgia was being administered in a racially discriminatory manner; and (7) his trial counsel provided him ineffective assistance during the sentencing phase of his case. The superior court rejected each of Moore's claims. The court rejected the *Enmund* and ineffective assistance of counsel claims because they had been fully litigated in Moore's first state habeas proceed-

10. The *Estelle v. Smith* claim actually consists of two claims, one based on the fifth and fourteenth amendments and another based on the sixth and fourteenth amendments. Throughout this opinion, I frequently refer to these claims as the *Estelle v. Smith* claim and, for convenience, omit reference to the fourteenth amendment.

ing and Moore gave no reason why they should be relitigated. The court held that Moore had waived his remaining claims by failing to raise them during that first proceeding. *See* Ga.Code Ann. § 9-14-51 (1982). On May 18, 1984, the Supreme Court of Georgia denied Moore's application for a certificate of probabie cause to appeal.

Moore then filed his second federal habeas petition, the one now before us, presenting the seven claims he asserted in his second state habeas petition. Moore alleged that these claims were based on newly discovered facts (the sixth claim) or novel legal principles (the six remaining claims) that were not available when he brought his first federal habeas petition. Moore also presented his *Gardner* claim, which he had raised in his previous federal habeas proceeding in a motion for leave to amend his petition.

On May 22, 1984, the district court entered a memorandum order dismissing Moore's petition and denying a certificate of probable cause. Except for the *Enmund* claim,[11] the court held that the delayed presentation of Moore's claims constituted an abuse of the writ; contrary to Moore's contention, they were neither based on newly discovered facts nor on new constitutional doctrine, and he gave no lawful reason why he should not have asserted them in his previous petition. Adopting the district court's memorandum order in full, a divided panel of this court affirmed the decision. *Moore v. Zant*, 734 F.2d 585 (11th Cir.1984) (per curiam).

11. The district court, observing that it had rejected the *Enmund* claim on the merits in Moore's previous federal habeas proceeding, held that the claim was meritless and that the ends of justice did not require its relitigation.

II.

The doors of the federal courts must always remain open to state prisoners seeking to bring constitutional challenges to the propriety of their confinement. *See Sanders v. United States*, 373 U.S. 1, 7-8, 83 S.Ct. 1068, 1072-73, 10 L.Ed.2d 148 (1963); *cf. Fay v. Noia*, 372 U.S. 391, 402, 83 S.Ct. 822, 829, 9 L.Ed.2d 837 (1963) ("[G]overnment must always be accountable to the judiciary for a man's imprisonment. . . ."). For this reason, the doctrine of res judicata does not apply to bar successive petitions for habeas corpus relief. *Sanders*, 373 U.S. at 7, 83 S.Ct. at 1072.[12] Habeas corpus is, however, grounded in principles

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12. Even though the federal courts may have previously rejected the petitioner's claim on the merits, a habeas judge will entertain it if the petitioner establishes that the ends of justice would be served by relitigation of the claim. *Sanders*, 373 U.S. at 16, 83 S.Ct. at 1078. The *Sanders* Court elaborated on this "ends of justice" test as follows:

> If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair. . . . If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. Two further points should be noted. *First*, the foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized. *Second*, the burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.

Id. at 16-17, 83 S.Ct. at 1078 (citation omitted). For further discussion of the standard applicable to successive petitions, see *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Although *Sanders* involved habeas corpus relief for federal prisoners, its standards apply to habeas corpus cases brought by state prisoners.

of equity. Accordingly, in deciding whether to entertain the merits of a claim contained in a successive petition, the court must consider the diligence with which the petitioner has pursued the claim. Depending upon the circumstances, a petitioner's lack of diligence may operate as a bar to relief. *Id.* at 17, 83 S.Ct. at 1078 ("'[A] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'") (citation omitted).

The Supreme Court expounded upon this equitable principle in *Sanders* and articulated the standard a trial judge should apply in deciding whether to consider the merits of a claim that the petitioner failed to prosecute in an earlier habeas proceeding. The judge must consider the "new" claim on the merits, unless the petitioner's delay in presenting it constitutes an abuse of the writ. *Id.* at 17, 83 S.Ct. at 1078. For example, the court may deem the petitioner to have waived the claim if, after raising it in a prior habeas petition, he abandoned the claim during his prosecution of that petition. Similarly, it may hold that the petitioner waived the claim if he deliberately withheld it from his prior petition with the expectation of presenting it in a subsequent petition. *Id.* at 18, 83 S.Ct. at 1078. As the Court noted in *Sanders*, these equitable bars to prosecution are unexceptionable because "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Id.* at 18, 83 S.Ct. at 1078.[13]

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13. Congress codified the general principles of *Sanders* in Rule 9(b) of the Rules Governing Section 2254 Cases (hereinafter

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A petitioner may also be denied relief even though he did not deliberately bypass an opportunity to litigate his claim in the prior habeas proceeding. The court may refuse to litigate his claim on the merits if it finds that his failure to raise it in the prior proceeding was the result of "inexcusable neglect."[14] *See Paprskar v. Estelle*, 612

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Rule 9(b)), *see* 28 U.S.C. § 2254 (1982); *see also* 28 U.S.C. § 2244(b) (1982). Rule 9(b) provides as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The initial burden of pleading an abuse of the writ under Rule 9(b) rests on the state, *see Sanders*, 373 U.S. at 17, 83 S.Ct. at 1078; *Price v. Johnston*, 334 U.S. 266, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948), although a district court may raise the issue *sua sponte*, *see Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir.1983) (en banc), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2356, 80 L.Ed.2d 829 (1984). Once the abuse of the writ issue has been raised, the petitioner "has the burden of answering that allegation and of proving that he has not abused the writ." *Price*, 334 U.S. at 292, 68 S.Ct. at 1063; *see also Funchess v. Wainwright*, 788 F.2d 1443, 1445 (11th Cir.1986) (per curiam); *Jones v. Estelle*, 722 F.2d at 164. As the Supreme Court noted in *Sanders*, "[t]he principles [for determining an abuse of the writ] are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1079; *see also Jones v. Estelle*, 722 F.2d at 165.

14. Equity has never countenanced contumacious conduct. Thus, a federal court will not entertain a claim that the petitioner deliberately withheld—or, if asserted, deliberately withdrew—with the idea of bringing it later if his attempt to obtain

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F.2d 1003, 1006 (5th Cir.), *cert. denied*, 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980);[15] *see also Funchess v. Wainwright*, 788 F.2d 1443, 1445 (11th Cir.1986) (per curiam); *Stephens v. Kemp*, 721 F.2d 1300, 1303 (11th Cir. 1983) (per curiam), *cert. denied*, 469 U.S. 1043, 105 S.Ct. 530, 83 L.Ed.2d 417 (1984); *Potts v. Zant*, 638 F.2d 727, 741 (5th Cir. Unit B Feb. 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981); *Haley v. Estelle*, 632 F.2d 1273, 1275 (5th Cir. Unit A 1980). Once the state contends that the petitioner's delayed presentation of his claim constitutes an abuse of the writ, the petitioner has the bur-

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habeas relief is unsuccessful. Nor will equity countenace inexcusable neglect. If the petitioner possessed the ingredients of his claim (the facts and the law) but simply neglected to bring it in his prior petition, a federal court, pursuant to Rule 9(b), may decline to consider the claim. There are sound policy reasons for this rule: (1) the need for finality of state court convictions; (2) the need to aid enforcement of state procedural rules barring the consideration on the merits of claims not seasonably presented (when the state has declined to decide the claim on the merits because of petitioner's procedural default); (3) the federal courts constitute a scarce resource and thus piecemeal litigation, which needlessly taxes the courts' dockets and prevents other litigants from having a speedy determination of their claims, should be avoided; and (4) federal court consideration of successive petitions harasses the state. *See Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir. Unit A 1980) ("Rule 9(b) was intended to eliminate the repetition of identical claims and the prolongation of litigation by the presentation of claims in a piecemeal fashion."); Rule 9(b) advisory committee's note ("This subdivision is aimed at screening out the abusive petitions from [the] large volume of second petitions], so that the more meritorious petitions can get quicker and fuller consideration.").

15. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

den of satisfying the habeas judge that he delay is excusable. The sufficiency of the peitioner's explanation is a matter committed to the judge's sound discretion. *See supra* note 13.

Whether a petitioner's failure to assert his claim in an earlier habeas proceeding is excusable will depend, of course, on the reasonableness of his conduct under the circumstances. For example, the court may deem a pro se petitioner to have waived his claim if it can be said that a reasonable person standing in his shoes could have brought the claim.[16] *See Price v. Johnston*, 334 U.S. 266, 292, 68

16. Arguably, a petitioner could be considered as having proceeded pro se in his previous habeas action if his counsel performed so ineptly as to have effectively rendered him without counsel. In this case, Moore does not contend, or even suggest, that his prior habeas counsel were inept.

In a case in which counsel prosecuted the petitioner's first habeas petition so ineptly that the petitioner could be considered as having proceeded pro se, the petitioner may have little difficulty in demonstrating that his failure to include a particular claim in his first petition was justified or excusable in the circumstances. I do not, however, endorse the majority's attempt to engraft analysis of ineffective assistance of counsel, in the sixth amendment sense, into the doctrine of abuse of the writ. In the majority's view, for example, Moore did not abuse the Great Writ when he failed to present his *Estelle v. Smith* claim in his first federal habeas petition, because "[a]n attorney's failure in 1978 to recognize the potential intersection of *Miranda* and Georgia capital sentencing proceedings, does not cause his performance to fall outside of 'the wide range of professionally competent assistance.' " *Ante* at 854 (quoting *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)).

This approach emasculates the doctrine of abuse of the writ because the failure to include a claim will almost always be excused. It will be excused under either of two theories,

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one of which will apply in nearly every case. The first excuse is that petitioner's previous habeas attorney was ineffective; the attorney should have prosecuted the omitted claim—its legal basis being readily available—but failed to do so because of his incompetence. This incompetence, in turn, effectively rendered petitioner without counsel. Thus, in deciding whether inexcusable neglect should preclude petitioner from litigating the omitted claim in the successive petition, the district court must treat petitioner's prior omission as that of a pro se litigant. Under the relaxed standard applicable to such litigants, the court will probably allow the petitioner to litigate his claim on the merits.

The rationale for the second excuse, contrary to that of the first excuse, assumes that the petitioner's previous habeas attorney was not ineffective; the attorney failed to prosecute the omitted claim because its legal basis was unavailable. Under these circumstances, the court will entertain the claim because it is based on "new law."

Following the majority's approach, a wise petitioner will assert both theories, alternatively, in response to the state's contention that his failure to present the omitted claim earlier is inexcusable. If the petitioner satisfies the court, as Moore has satisfied the majority in this case, that his claim is founded on new law, the court must adjudicate his claim on the merits. If he fails to convince the court that his theory of relief is new—because the theory was extant at the time of the previous habeas proceeding—then, petitioner will argue the court must find that his attorney was "ineffective." In either case the result is the same: the court entertains the claim on the merits. The concept of inexcusable neglect ceases to exist.

The majority's approach to abuse of the writ analysis defies logic. It also lacks any support from precedent or policy. First, there is no constitutional right to effective assistance of counsel in habeas corpus proceedings. *See* U.S. Const. amend. VI ("*In all criminal prosecutions,* the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.") (emphasis added); *see also Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir.1985) (per curiam) ("[T]here is no constitutional right to the assistance of counsel in a collateral at-

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S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948); *Booker v. Wainwright*, 764 F.2d 1371, 1376-78 (11th Cir.) (quoting *Mays v. Balkcom*, 631 F.2d 48, 51 (5th Cir.1980)), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985); *Haley*, 632 F.2d at 1275-76. A petitioner represented by counsel, on the other hand, may be deemed to have waived his claim if a reasonably competent attorney could have recognized and prosecuted the claim. *See Jones v. Estelle*, 722 F.2d 159, 167 (5th Cir.1983) (en banc) ("Given [the] elemental

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tack on a conviction."); *Williams v. Missouri*, 640 F.2d 140, 144 (8th Cir.), *cert. denied*, 451 U.S. 990, 101 S.Ct. 2328, 68 L.Ed.2d 849 (1981) ("[Habeas corpus proceedings] are civil proceedings not covered by the Sixth Amendment which applies only during the pendency of the criminal case."); *Ganz v. Bensinger*, 480 F.2d 88, 89 (7th Cir.1973) (sixth amendment inapplicable outside the context of criminal trial); *see also Pennsylvania v. Finley*, — U.S. —, —, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987) (no right to counsel on collateral attack).

Second, the policies of federal habeas corpus do not require that a habeas counsel's "inffectiveness" excuse the petitioner's failure to present a claim in a timely manner. The petitioner has an obvious interest in the just resolution of his constitutional claims, but he does not have a constitutionally guaranteed right to effective habeas counsel. Countervailing considerations—such as finality of conviction, deterring counsel's sandbagging of established claims, and the doctrine that a habeas petitioner must be held accountable for the actions of his attorney—outweigh the petitioner's interest, assuming, at least, that his counsel was not so ineffective as to render his presence in the case irrelevant. Indeed, if attorney ineffectiveness constitutes an excuse for Rule 9(b) purposes, the only deterrent to the piecemeal litigation of claims will be counsel's self-interest in avoiding a charge, brought by the lawyer prosecuting the petitioner's successive petition, that he was professionally incompetent.

Finally, inherent in the "inexcusable neglect" standard is the notion that lawyer neglicence is not a ground for excusing the failure to present a constitutional claim in a timely fashion.

role of counsel in our adversary system, we think it inevitable that the inquiry into excuse for omitting a claim from an earlier writ will differ depending on whether petitioner was represented by counsel in the earlier writ prosecution."), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2356, 80 L.Ed.2d 829 (1984); *see also Hamilton v. McCotter*, 772 F.2d 171, 178-80 (5th Cir.1985). In sum, if a petitioner fails to prosecute a claim when its factual and legal bases are present, two inferences are permissible: either he is deliberately withholding the claim, perhaps with the idea of asserting it in a subsequent petition, or he is simply neglecting to pursue it.

In this case, the State contends that Moore's failure to assert in his first petition the claims now before us was inexcusable. The State notes that Moore was represented by counsel throughout his collateral attacks on his convictions and death sentence, that there are no newly discovered facts in Moore's case—the facts supporting each of his claims being well known at the time he brought his first petition—and that the federal constitutional implications of those facts were plainly discernable from the relevant case law. Moore acknowledges that there are no newly discovered facts; his disagreement with the State, the district court, and the panel concerns the legal significance of the facts.[17] Moore contends that a reasonably competent lawyer, standing in the shoes of his previous habeas counsel, did not have the tools to fashion the constitutional claims, explicitly recognized in *Estelle v. Smith* and *Prof-*

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17. Moore's disagreement with the State on the "new law" point concerns his *Estelle v. Smith* and *Proffitt* claims. I discuss the parties' dispute over Moore's *Gardner* claim in Part VI *infra*.

fitt, concerning the sentencing court's receipt into evidence of the probation officer's presentence report. Moore submits that this contention, if true, constitutes a lawful excuse, which the district court and panel should have accepted as a matter of law, for the delayed assertion of these constitutional claims.

I disagree with Moore's basic premise regarding what a reasonably competent lawyer should have recognized at the time of Moore's first federal habeas petition. At the time Moore filed that petition, there was ample precedent for the constitutional objections Moore now makes. This point becomes clear when one analyzes the Georgia capital sentencing scheme, as it existed at the time of Moore's sentencing proceeding; the procedures that the court, the prosecutor, and defense counsel followed in conducting that proceeding; and the constitutional precedent available to Moore when he first sought federal habeas relief. Accordingly, I find no abuse of discretion in the district court's refusal to entertain the merits of the claims in question.

III.

Moore presents two "new law" claims in his current habeas petition. The first claim, based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), is that the State failed to inform him of his right to remain silent and of his right to consult with counsel prior to the probation officer's presentence interview of him, in violation of the fifth, sixth, and fourteenth amendments. The second claim, based on *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified*, 706 F.2d 311 (11th Cir.), *cert.*

denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), is that the sentencing judge denied him the right to confront and cross-examine the witnesses upon whose statements the probation officer based his presentence report. To determine whether a reasonable lawyer should have recognized these claims when Moore filed his first federal habeas petition, it is necessary to appreciate the factual context in which they arose. I therefore begin my analysis with an examination of the Georgia death penalty scheme and the manner in which the trial court, the prosecution, and the defense conducted Moore's sentencing proceeding. In discussing Moore's claims, we must be aware that his defense counsel did not present them to the sentencing court when given the opportunity to do so; that is, the presentence report, which Moore now contends was prepared and introduced into evidence in violation of the Constitution, was admitted into evidence without objection during an adversary proceeding.[18]

A.

The Georgia capital sentencing law, as it existed in 1974, was much the same as it is today.[19] The Georgia legislature enacted this law in light of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726,

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18. Moore's failure to object at the sentencing hearing may constitute a procedural default. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). This issue is, however, not before the court.

19. The statutory citations in Part III of my opinion are to the provisions that were in effect at the time of Moore's trial in 1974. These provisions continue in force with few substantive changes, none of which are relevant here.

33 L.Ed.2d 346 (1972), which struck down Georgia's previous death penalty statute. *See* 1974 Ga.Laws 352 (codified as amended in scattered sections of the Georgia Code); 1973 Ga.Code 159 (codified as amended in scattered sections of the Georgia Code). The new law provided for a bifurcated capital trial. The first part of the trial concerned the defendant's guilt or innocence. The second part concerned the sentence to be imposed: death or life imprisonment.[20] *See* Ga.Code Ann. § 27-2503(b) (Harrison 1978). As in the case of the guilt phrase of the trial, the defendant in the sentencing phase was entitled to a jury proceeding. *See id.* The defendant could, however, waive his right to a jury in either phase of the case and elect to proceed before the trial judge.

In seeking capital punishment, the state had the burden of proving beyond a reasonable doubt that the defendant's case was eligible for the death penalty by establishing one or more of ten statutory aggravating circumstances.[21] *Id.* § 26-3102;[22] *id.* § 27-2534.1(b), (c); *see Gregg*

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20. The Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153, 163-64, 96 S.Ct. 2909, 2920-21, 49 L.Ed.2d 859 (1976) (plurality), viewed this sentencing phase as an integral part of the trial of a death penalty case.

21. The ten statutory aggravating circumstances enumerated in section 27-2534.1(b) were as follows:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged

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in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement of himself or another.

22. Section 26-3102 stated as follows:

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes

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v. Georgia, 428 U.S. 153, 164-66, 96 S.Ct. 2909, 2921-22, 49 L.Ed.2d 859 (1976) (plurality); *see also* Ga. Code Ann. § 27-2537(c)(2) (Harrison 1978). The state could introduce only that evidence of aggravating circumstances of which it had notified the defendant before trial. *Id.* § 27-2503(a); *see also Potts v. State,* 241 Ga. 67, 243 S.E.2d 510, 522 (1978).

The defendant could avoid the imposition of the death penalty in any of three ways. The first was to convince the court on motion for directed verdict that the state's evidence failed to establish an aggravating circumstance.[23] The second was to convince the jury that the state failed to carry its burden of proof on that issue. Finally, the defendant could urge the jury not to impose the death penalty because of mitigating circumstances present in the case. Under Georgia law, the defendant had wide latitude

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a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

23. The trial judge's determination as to the sufficiency of the evidence supporting the aggravating circumstances was subject to judicial review. *See* Ga.Code Ann. § 27-2537(c)(2) (Harrison 1978).

in introducing mitigating evidence. *Gregg,* 428 U.S. at 164, 96 S.Ct. at 2921 (citing *Brown v. State,* 235 Ga. 644, 647-50, 220 S.E.2d 922, 925-26 (1975)).

The sentencing proceeding I have described was clearly adversarial. Like a criminal trial, it began with the prosecutor's opening statement, explaining what the state must prove and how it intended to satisfy its burden. After the defense's opening statement, which could be reserved until the close of the state's case, the prosecution presented its evidence, which the defense was entitled to cross-examine. When the state rested its case, the defense had the right to seek a directed verdict on the aggravating circumstances issue. If the court did not direct a verdict, the defense could rebut the state's evidence of aggravating circumstances and could present mitigating evidence. The state, in turn, had the right to rebut the defendant's case. At the close of all the evidence, both sides argued their case to the jury, the court instructed the jury on the law, and the jury retired to deliberate its verdict—the death sentence or life imprisonment. The trial judge then imposed the sentence in accordance with the jury's verdict. Cases tried to the court instead of to the jury followed the same procedures, except that the trial judge replaced the jury as the finder of fact and the sentencer.

B.

Moore's 1974 sentencing hearing followed these procedures. On June 4, 1974, Moore pled guilty to the charge of malice murder and armed robbery and waived his right to jury sentencing. The court scheduled the sentencing hearing in Moore's case for July 21, 1974, and directed its

probation office to prepare a presentence report.[24] Following normal procedures, Probation Officer Rachels interviewed Moore, inquiring into the circumstances of the murder and armed robbery offenses he had committed and into his background. Moore contends that Rachels violated *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), by not advising him of his rights to remain silent and to have the presence of counsel during the interview, and that Rachels violated the sixth amendment by interviewing him without notifying his attorney. For purposes of this appeal, I assume the truth of these allegaitons. At the same time, I note that these constitutional violations were of no consequence until Rachels' report was received into evidence and thus made available to the trial court.

At the same time prior to the sentencing hearing, the prosecutor informed Moore's attorney that the state would seek the death penalty based on one aggravating circumstance—that Moore had committed the murder in question while he was engaged in the commission of armed robbery. At the sentencing hearing, the prosecutor presented the state's case as if he were establishing the defendant's guilt as well as seeking a death sentence. He called four witnesses: a medical examiner, two Georgia Bureau of Investigation agents, and the sheriff of Jefferson County,

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24. Georgia law authorized trial judges to request a presentence report in all criminal cases, except those involving offenses punishable by death or life imprisonment, for the purpose of determining whether to place the defendant on probation and the conditions of his probation supervision. Ga. Code Ann. § 27-2709 (Harrison 1978). The record does not disclose why the court disregarded this statutory prohibition in this case.

Georgia, who collectively established how Moore had committed the crimes. Moore's trial counsel cross-examined each of these witnesses. In addition, the prosecutor offered the presentence report into evidence during the State's case in chief without calling Officer Rachels to the witness stand. In offering the report, the prosecutor stated that "Counsel for the Defendant has received a copy of the report so that it will be included in the record, which includes reports and letters that have been submitted by Counsel for the Defendant." In response, Moore's attorney stated, "That is agreeable, Your Honor, and at the same time we would like for a copy of the warrants to go in also."[25] The prosecutor also introduced various

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25. This statement by Moore's attorney, considered in light of the evidentiary record of Moore's first state habeas proceeding, which contains, among other things, a statement by Officer Rachels that he gave Moore's attorney a copy of the presentence report on the day of the sentencing hearing, convinces me, as it did the state habeas court and the district court below, *see infra* Part VI, that Moore's *Gardner* claim is baseless. Contrary to Moore's present allegations, his attorney had an opportunity to inspect the presentence report before the prosecutor offered it into evidence and to object if he thought that the report contained inaccurate statements or material omissions. To me, this fact explains why counsel did not object to the report on the ground that he had not seen it or, having seen it, had not had sufficient time to consult with his client about any inaccuracy in the report.

In fact, the record unequivocally demonstrates that defense counsel communicated with Officer Rachels concerning the presentence report on several occasions prior to the sentencing hearing, and that he furnished Rachels with several letters vouching for Moore's character and various records of Moore's previous academic achievements. Apparently as a matter of strategy, Moore's attorney chose to present this mitigating evidence to the trial judge through the probation offic-

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other exhibits, including photographs of the victim, and of the crime scene, diagrams, a crime lab report, and the victim's shotgun. Moore's counsel expressly declined to object to the introduction of any of these exhibits, including, as I have noted, the presentence report.[26] After the

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er's presentence report rather than through the live testimony of witnesses. This strategy may account for the failure of defense counsel to invoke the well-established evidentiary rules discussed *infra* note 26 and to object to the report's admission into evidence. Perhaps, the same strategy also explains why defense counsel did not object to the report on the fifth and sixth amendment grounds Moore now asserts. In pursuing this strategy, counsel must have appreciated the fact that the report's description of the murder and armed robbery simply replicated the facts the prosecutor established at the sentencing hearing and thus caused Moore no prejudice.

26. When the prosecutor offered the presentence report, Moore's attorney, if he wished to preclude the court from using it, could have objected to the report's admission into evidence on the ground that the report had not been authenticated by the probation officer who prepared it. This objection would have been well founded and would have prompted the prosecutor to call Officer Rachels to the stand. Even had the State authenticated the report by live testimony, the defense still could have prevented the report from being received into evidence. The defense could have established that the report was not admissible because it was merely a recording of Rachels' present recollection, and that if the prosecutor wanted to bring the contents of the report before the court he would have to do so through Rachels' live testimony, albeit refreshed by reference to the report. Assuming the validity of this argument, which had solid support in the law of evidence, *see* G. Lilly, *An Introduction to the Law of Evidence* 231-32 (1978); *see also McCormick on Evidence* § 9 (E. Cleary 2d ed. 1972), the prosecutor would have proceeded to elicit from Rachels what he had learned concerning the circumstances of both the murder and the armed robbery and of Moore's background.

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Any statements Moore had given Rachels would have constituted admissions and thus would not have been precluded by the hearsay rule. These statements would have been subject to objection, however, on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and sixth amendment grounds—the argument being that Officer Rachels, in interviewing Moore and particularly in focusing on how the crimes were committed, occupied a position similar to that of a police officer interrogating a defendant in custody during a critical stage of his criminal proceedings. Because Rachels had not given Moore a *Miranda* warning and had not notified Moore's lawyer before commencing the interview, the defense could have urged the court to suppress any information Rachels obtained from Moore. Further, the defense could have objected to any background information Rachels may have obtained from sources other than Moore as hearsay, if offered to prove the truth of the contents, and on confrontation clause grounds.

In sum, Moore's attorney could have kept the entire presentence report, as a document, out of evidence on obvious evidentiary grounds. As for Officer Rachels' testimony concerning the substance of the report, Moore's attorney could have made good faith objections (1) on *Miranda* or right to counsel grounds to any statements Moore made to Rachels and to any information derived from those statements, and (2) on confrontation clause grounds to any statements Rachels obtained from other sources if offered to prove the truth of their contents. The requirement that the sentencing decisionmaker find at least one statutory aggravating circumstance beyond a reasonable doubt, in my view, means that the full panoply of constitutional protections available during the prosecution of a criminal case applied to the sentencing phase of capital cases in Georgia in 1974, and thus to the sentencing phase of Moore's case. These rights included the right implicated in Moore's *Estelle v. Smith* and *Proffitt* claims: the fifth amendment right not to be compelled to incriminate oneself, *see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); the sixth amendment right to counsel, *see Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); and the sixth amendment right to confront and

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State rested, the defense presented its case. Moore's counsel called four witnesses, including the defendant, to establish mitigating circumstances.

Following a recess for lunch, the trial judge heard the arguments of the prosecution and of the defense, none of which was transcribed. After another recess, the trial judge sentenced Moore to death, finding beyond a reasonable doubt that Moore was engaged in armed robbery at the time of the murder and that there were no mitigating

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cross-examine the prosecution's witnesses, see *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Having created an adversary criminal proceeding in which the factfinder must find an aggravating circumstance beyond a reasonable doubt, as a condition precedent to the imposition of the death penalty, Georgia would have violated the Constitution if, during the sentencing phase of a capital trial, it denied the defendant the rights the Constitution guaranteed him during the guilt phase of the prosecution. *Cf. Gardner v. Florida*, 430 U.S. 349, 360, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) (plurality) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."); *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975) (noting importance of advocacy of counsel in the factfinding process of criminal trials). The conduct of the court and of counsel during the prosecution of Moore's case supports my view that Georgia's capital sentencing scheme accommodated these basic constitutional rights, including the specific constitutional rights concerning the presentence report Moore seeks to enforce in the present habeas proceeding If Moore's trial attorney could have made these arguments at the July 1974 sentencing hearing, it logically follows that his habeas attorney could have presented them when he filed Moore's first federal habeas petition in November 1978, particularly given the state of the law in 1978. *See infra* parts IV and V.

circumstances sufficient to outweigh this aggravating circumstance.[27]

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27. The court made the following findings:

> On the question of punishment, prior to the imposition of the death penalty, one statutory aggravating circumstance is found by the Court to exist, to wit: the murder of Fredger Stapleton was committed while the accused, William Neal Moore, was engaged in the commission of another capital felony, that is, armed robbery of the said Fredger Stapleton. Also, I find that the armed robbery of Fredger Stapleton was committed while the accused, William Neal Moore, was engaged in the commission of another capital felony, that is murder of the said Fredger Stapleton.
>
> . . . .
>
> The death penalty statute of Georgia, Code section twenty-seven, twenty-five thirty-four point one, requiring proof of aggravating circumstances to justify the imposition of the death penalty was enacted by the General Assembly of Georgia, signed into law by the Governor of Georgia, and held to be constitutional by the Supreme Court of Georgia in Coley versus State, two thirty-one Georgia, eight twenty-nine. It is therefore the function of this Court to apply this statute to the facts of this case in determining the punishment to be imposed. This I have done.
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> . . . .
>
> IT IS FURTHER ordered and adjudged by the Court that on the thirteenth day of September nineteen seventy-four, the defendant, William Neal Moore, shall be executed by the Director of the State Department of Corrections at such penal institution as may be designated by said Director. . . .
>
> SO, I FOUND aggravating circumstances. I also found, but I didn't need to find, for purposes of this finding, mitigating circumstances insofar as the aggravating circumstances were concerned. Mitigating means good circumstances, those being your willingness and your forthrightness in meeting what must be to you a terrible, terrible experience. So that does go to your credit, but for the purposes of this Court, for this finding, I could not in good conscience apply in your case sufficient to wipe out the aggravating statutory circumstances.

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IV.

A review of the state of the law in 1978 demonstrates that the fifth and sixth amendment claims I have described, i.e., Moore's *Estelle v. Smith* and *Proffitt* claims, were available to a reasonably competent attorney. In the next two parts of this opinion, I discuss the specific precedential antecedents of *Estelle v. Smith* and *Proffitt.* Contrary to the majority's conclusion, I believe that these antecedents provided Moore with the tools to present his fifth and sixth amendment claims in his first federal habeas corpus petition.

A.

Moore claims that the State infringed his fifth amendment right against self-incrimination and his sixth amend-

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We've got this. If we're going to philosophy [sic] about it, and if I'm permitted to do that, I'll do it. People in their homes—the most precious place a man can have—is his home; and to be in a home, and probably this man was asleep, I don't know, or for any person to be, not this man, but any person, to be asleep in his home, to be invaded by an intruder, that's armed with weapons, that's prepared necessarily to kill (or otherwise the weapon wouldn't be there in the hands of the intruder), is probably an invasion of the highest injustice that another can do. Now, I can only imagine that anyone that is invaded by an intruder with an armed weapon, the fear that they must go through when they are encountered in such a situation. So, I feel like that if the Court ever does require mandatory punishment—that is when they specify by law what offenses will have to be suffered by the electric chair—that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

ment right to counsel when Probation Officer Rachels interviewed him without giving him a *Miranda* warning and giving his counsel advance notice of the interview. These infringements subsequently operated to his detriment, Moore contends, when the trial judge relied on information contained in Rachels' presentence report to determine his sentence. Moore alleges that he was not properly warned that he had a fifth amendment right to remain silent, or that the information he revealed could be used against him. He further alleges that he was not told of his sixth amendment right to consult with counsel. Moore argues, and the majority agrees, that he is excused from having presented these allegations in his earlier petition because the Supreme Court did not *explicitly* recognize that a defendant's fifth and sixth amendment rights apply to the penalty stage of a capital proceeding until its decision in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Because I do not believe that the constitutional principles articulated in *Estelle v. Smith* were the type of " 'new' constitutional rule[s]," *Reed v. Ross*, 468 U.S. 1, 17, 104 S.Ct. 2901, 2911, 82 L.Ed.2d 1 (1984), that might excuse a habeas petitioner from failing to invoke them at an earlier time, I believe that Moore's attempt now to seek relief under those principles is an abuse of the writ. *See Potts v. Zant*, 638 F.2d 727, 741 (5th Cir. Unit B Feb. 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).

In *Estelle v. Smith*, the trial judge, *sua sponte*, ordered that the defendant undergo a psychiatric examination to determine his competency to stand trial for a capital crime. The judge subsequently found the defendant

competent and, following a trial, a jury convicted him of the capital crime. At the penalty stage of the proceeding, the State offered the testimony of the court-appointed phychiatrist, who had examined the defendant solely for competency purposes, to prove the defendant's future dangerousness, a condition precedent to the imposition of the death penalty. Basing his testimony on his competency examination, the psychiatrist testified that he believed that the defendant would always be dangerous. The jury, relying on this testimony, mandated the death penalty. *See Estelle v. Smith*, 451 U.S. at 456-60, 101 S.Ct. at 1870-71.

The Supreme Court, affirming a unanimous panel of the former Fifth Circuit, held that the State's use of the phychiatrist's testimony had violated the fifth, sixth, and fourteenth amendments. Finding the psychiatric examination analogous to the custodial interrogation in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court held that the defendant should have received a *Miranda* warning before the psychiatrist interviewed him. *See Estelle v. Smith*, 451 U.S. at 466-69, 101 S.Ct. at 1875-76. Furthermore, the Court unanimously concluded that under the sixth and fourteenth amendments, the psychiatric examination was a critical stage of the criminal proceeding, and thus the State should have forewarned the defendant's attorney that the results of that examination could be used other than for a determination of his client's competency to stand trial. Because the attorney had not been so informed, the State had denied the defendant his right to consult with counsel during a critical stage of the proceedings. *See id.* at 469-72, 101 S.Ct. at 1876-77.

Subsequently, our predecessor court held that we should apply *Estelle v. Smith* retroactively. *See Battie v. Estelle*, 655 F.2d 692, 696-99 (5th Cir.1981). The court reached this decision by relying on a two-pronged test, the first part of which is relevant to the issue presently before us. Specifically, the court stated that although "a decision which establishes a *new* principle of law" will be only prospectively applied, *id.* at 697 (emphasis added), "[a] decision which merely restates existing law or which simply applies already established law to a set of facts different from those which gave birth to the original principle is given retroactive application," *id.* The former Fifth Circuit then traced the state of the law prior to *Estelle v. Smith*, and concluded that "the holding in *Smith* followed logically from the *Miranda* decision itself," *id.* at 699, noting that both cases were "concerned with official custodial interrogations of an accused and the use of statements obtained from an accused without an attorney in such circumstances to prove the State's case against the accused." *Id.* (footnote omitted). In sum, the court held that "*Smith* did not establish a new principle of federal constitutional law." *Id; see also Muniz v. Procunier*, 760 F.2d 588, 590 (5th Cir.) (decision of new Fifth Circuit that the Supreme Court, in *Estelle v. Smith*, saw the State's conduct "as violating *clearly established* constitutional law") (emphasis added), *cert. denied*, 474 U.S. 934, 106 S.Ct. 267, 88 L.Ed.2d 274 (1985).

Holdings of the former Fifth Circuit are binding upon this court unless overruled by an en banc decision. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all deci-

sions of the former Fifth Circuit handed down prior to October 1, 1981). Because we took this case en banc, we have the opportunity to overrule the *Battie* holding if that step is desirable. I am unconvinced, however, that *Battie* was decided erroneously, and unlike Judge Godbold, I would therefore reaffirm its holding that *Estelle v. Smith* did not spring full blown and without warning into the law of criminal procedure.[28] Furthermore, even ignoring *Battie,* an investigation of what Judge Godbold terms "the state of the law in November 1978," *see ante* at 851 reveals that case law then existing "laid the basis for [Moore's] constitutional claim." *Engle v. Isaac,* 456 U.S. 107, 131, 102 S.Ct. 1558, 1573, 71 L.Ed.2d 783 (1982).

B.

The state of the law in 1978, when Moore filed his first federal habeas petition, demonstrates that he cannot be excused for having failed to recognize and allege his *Estelle v. Smith* claim. *Estelle v. Smith* was merely the refinement of constitutional principles that the Supreme Court had already established; Moore therefore had ample thread from which to weave the fifth and sixth amendment

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28. Judge Godbold's limited discussion of *Battie* fails to distinguish adequately the question decided in that case from the one we face today. I think it is clear that if we adopt Judge Godbold's argument, we eliminate the foundation of *Battie.* If Judge Godbold in fact means that the Supreme Court's decision in *Estelle v. Smith* was so unexpected, and such a clear break with the past, that a reasonable lawyer lacked the "tools" to raise such a claim, then I submit that this court is obligated to reconsider our precedent holding *Estelle v. Smith* retroactive. *See Allen v. Hardy,* — U.S. —, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (new constitutional standards rarely applied retroactively).

claims recognized in that case when he first sought federal habeas relief.

Fifteen years before its *Estelle v. Smith* decision, the Supreme Court established safeguards to protect fifth amendment rights during custodial questioning. In *Miranda v. Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966), the Court announced the well known "*Miranda* warning" and stated that "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Following *Miranda,* in *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Supreme Court further extended the protection of the fifth amendment. In that case, the state argued that the right against self-incrimination should not apply in juvenile courts, because proceedings in those areas were "civil" rather than "criminal." The Court, however, refused to accept such a mechanical view of the fifth amendment, finding it "clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Id.* at 49, 87 S.Ct. at 1455.

The Supreme Court's expansion of the fifth amendment right against self-incrimination described above, along with its decisions broadening the sixth amendment right to counsel, *see, e.g., Mempa v. Rhay,* 389 U.S. 128, 134-37, 88 S.Ct. 254, 256-58, 19 L.Ed.2d 336 (1967) (right to counsel applies to "every stage of a criminal proceed-

ing where substantial rights of a criminal accused may be affected," including sentencing and probation revocation); *In re Gault*, 387 U.S. at 34-42, 87 S.Ct. at 1447-51 (right to counsel during juvenile delinquency proceedings); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (plurality) (majority of Court agreeing that sixth amendment right to counsel attaches at "critical stage" of proceedings), provided Moore with the tools from which he could have crafted his claim that his fifth and sixth amendment rights attached at the penalty stage of his trial as well as at the guilt stage. I cannot agree with Judge Godbold's view that in 1978 a reasonable attorney could not have recognized and presented a non-frivolous argument that the standards these cases established should also apply during the sentencing stage of a bifurcated capital trial.[29]

My conclusion is supported by two other factors especially significant in deciding whether Moore can be excused for failing to argue his *Estelle v. Smith* claim in his first federal habeas petition. First, Moore's claim arose in the

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29. Judge Godbold, in stating that a reasonably competent attorney could not have anticipated the application of the fifth and sixth amendments in the *Estelle* v. *Smith* factual context, implies that such an attorney would have had even more difficulty anticipating the application of those principles in the factual context presented in this case. *See ante* at 853 n. 10. I disagree. The applicability of the *Estelle* v. *Smith* principles to a probation officer's interview of the defendant is more obvious than is the applicability of those principles to a psychiatric interview of the defendant. The probation officer in this case was acting as would a policeman. He questioned the defendant during a critical stage of the criminal proceeding, and the primary focus of the interview was to elicit from the defendant precisely how he committed the murder and armed robbery of the victim.

context of a capital case. Following the Supreme Court's decisions in, among others, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality); and *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality), a reasonable lawyer could have recognized that constitutional claims that might be unmeritorious in a non-capital proceeding could be tenable if a sentence of death was involved.[30] Indeed, even before Moore filed his first habeas petition, the Supreme Court had explicitly recognized that a majority of its members acknowledged the special concerns of capital sentencing and agreed that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (plurality). Second, the Court's opinion in *Gardner*, decided well over a year before Moore first sought habeas relief, eliminated any doubt that a defendant's constitutional rights apply to the sentencing stage as well as to the guilt stage of a capital case. *See id.* at 358, 97 S.Ct. at 1204-05

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30. I do not mean to argue that the rights affirmed in *Estelle* v. *Smith* apply only when a defendant faces capital punishment. The *Estelle* v. *Smith* Court rested its decision solely on the fifth and sixth amendments (as applied to the states through the fourteenth amendment), not on the eighth amendment (as applied through the fourteenth amendment). *See Estelle* v. *Smith*, 451 U.S. at 473, 101 S.Ct. at 1878; *Battie* v. *Estelle*, 655 F.2d 692, 700 n. 17 (5th Cir.1981). My discussion in the text is merely meant to point out that an attorney in 1978, recognizing that the law regarding capital sentencing was in flux, might have been especially likely to foresee the explicit application of certain constitutional safeguards to the penalty stage of a bifurcated capital proceeding.

(sentencing process is a "critical stage" and it "must satisfy the requirements of the Due Process Clause").[31] With *Miranda* and *Gardner*, and the Court's intervening decisions, a lawyer in 1978 easily could have discerned the constitutional infirmities Moore now raises.[32]

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31. Judge Godbold attempts to distinguish *Gardner's* importance by noting that it was a plurality opinion. First, five justices agreed that the defendant in *Gardner* was entitled to constitutional protections, other than those derived from the eighth amendment, during the sentencing phase of his trial. Second, the entire thrust of the "new law" exception to the abuse of the writ doctrine is to excuse claims based on "unanticipated" changes in the law, not to allow a petitioner to sit back and ignore his nascent claims until a majority of the Supreme Court announces a favorable decision. Thus, the number of justices who explicitly ascribed to that portion of *Gardner* relevant to this case is of no significance. For the "novelty" argument, the point is that the Court had explicitly given lawyers a powerful tool to build constitutional arguments for actions relating to sentencing.

32. As I demonstrated in the text, by 1978 a reasonable lawyer had the tools from which he could construct the *Estelle v. Smith* claim that Moore now seeks to assert in his successive petition. Even if the petitioner in *Estelle v. Smith* was the very first person actually to litigate his type of claim, Moore would still be unable to argue "novelty" to excuse his failure earlier to raise his claim. The fact of the matter, however, is that before Moore brought his first federal habeas petition on November 22, 1978, litigants had already raised similar claims in other criminal cases. *See Smith v. Estelle*, 445 F.Supp. 647 (N.D.Tex.1977) (district court decision in case upon which Moore rests his claim decided nearly one year before Moore filed his federal habeas petition), *aff'd*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Livingston v. State*, 542 S.W.2d 655, 661-62 (Tex.Crim.App. 1976) (addressing contention that testimony by state appointed psychitarists at penalty stage of capital trial, based on interview with defendant, violated federal Constitution), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); *Armstrong v. State*, 502 S.W.2d 731, 734-35 (Tex.Crim.App

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V.

In his second federal habeas petition, Moore also presented, for the first time in federal court, a claim that the admission into evidence of the presentence report violated his sixth amendment right to confront and cross-examine the witnesses whose statements the report memorialized. Specifically, he alleged that an opportunity to confront and cross-examine those witnesses "could have corrected the misimpressions about his financial, military and marital circumstances, clarified the circumstances of the crime, and presented the truth about his prior juvenile record." The majority today holds that Moore's failure to raise this claim in his earlier petition was excused because confrontation rights were not explicitly extended to capital-sentencing proceedings until this court's decision in *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983). Because I believe that *Proffitt*, like *Estelle v. Smith*, did not articulate

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1973) (same). Although the Texas state court decisions had rejected the claim the Supreme Court later upheld in *Estelle v. Smith*, this result does not excuse Moore's failure to raise a similar claim in his first federal habeas petition. Given that previous state court rulings contrary to a defendant's federal claim do not excuse his failure to object timely during his state court proceedings, *see Engle v. Isaac*, 456 U.S. 107, 130, 102 S.Ct. 1558, 1573, 71 L.Ed.2d 783 (1982), surely such rulings cannot excuse a petitioner's failure to raise those claims in a *federal* forum. Thus, the state court rulings cited above are significant not for their holdings, but because they evince other defendants' recognition—prior to *Estelle v. Smith*—that the state's use of certain evidence in sentencing a defendant was susceptible to a constitutional challenge.

a new constitutional rule, I would affirm the district court's judgment that Moore's omission of this claim in his earlier petition was not excusable.

In *Proffitt,* the defendant submitted to examination by two psychiatrists prior to sentencing. One of the psychiatrists was subsequently unable to attend the defendant's sentencing hearing before the trial judge, and his views concerning the defendant's competence and mental state were submitted solely in a written report. The defendant requested, but did not receive, an opportunity to cross-examine the psychiatrist concerning the report. *Proffitt,* 685 F.2d at 1250-51 & n. 36a.

The *Proffitt* court noted that the rights secured by the sixth amendment, including the right to cross-examine adverse witnesses, apply only to "critical stages of the trial." *Id.* at 1252 (citations omitted). Acknowledging that the protections of the sixth amendment do not apply with full force in all sentencing proceedings, the court noted that the applicability of cross-examination rights to capital-sentencing hearings "has not been specifically addressed by the Supreme Court and is an issue of first impression in this Circuit." *Id.* at 1253. The court concluded that Proffitt was entitled, under the sixth amendment, to cross-examine the psychiatrist at his sentencing hearing. *Id.* at 1255.

Proffitt was presaged by a long line of cases extending sixth amendment protections in a variety of contexts, as well as by cases addressing the special safeguards constitutuionally mandated in capital cases. In 1965, the Supreme Court held that the sixth amendment secures the right to cross-examine adverse witnesses in state criminal

proceedings. *See Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). The High Court has repeatedly recognized that the right to cross-examine adverse witnesses, like the right to counsel, is a fundamental requirement for a fair trial and for ensuring due process of law. *Chambers v. Mississippi,* 410 U.S. 284, 294-95, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973); *Pointer,* 380 U.S. at 405, 85 S.Ct. at 1068; *In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948).

As this court noted in *Proffitt,* 685 F.2d at 1252 (citations omitted), the right to cross-examination only applies to "critical stages of the trial." During the 1960s and 1970s, the extent to which various phases in the criminal process, including sentencing hearings, constituted "critical stages" for purposes of the sixth amendment was an unsettled question. *See, e.g., United States v. Fatico,* 579 F.2d 707, 713-14 (2d Cir.1978); Taparauskas, *An Argument for Confrontation into the Sentencing: Bringing the Offender into the Sentencing Process,* 8 Cumb.L.Rev. 403, 426-40 (1977); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay,* 47 Tex.L.Rev. 1, 1-6 (1968).

Although the law in this field was in a state of disarray, the clear trend was toward expanding the full panoply of sixth amendment rights, including the confrontation rights. *See, e.g., Clements v. Turner,* 364 F.Supp. 270, 275 (D.Utah 1973); Taparauskas, *supra,* p. 873, at 426-40 (discussing trend toward expanded right to confrontation). For example, in *Mempa v. Rhay,* 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), the Supreme Court recognized the

sixth amendment right to counsel in a sentencing and probation revocation hearing, noting as follows:

> There was no occasion in *Gideon* [*v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963),] to enumerate the various stages in a criminal proceeding at which counsel was required, but [several Supreme Court cases] clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. In particular, [*Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948),] illustrates the critical nature of sentencing in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at sentencing. Many lower courts have concluded that the Sixth Amendment right to counsel extends to sentencing in federal cases.

Mempa, 389 U.S. at 134, 88 S.Ct. at 256-57 (citations and footnotes omitted). In *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972), the Supreme Court noted that parole revocation—*unlike sentencing*—"is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." Nonetheless, the Court held that due process requires that parolees in these proceedings receive an array of procedural protections, including "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 489, 92 S.Ct. at 2604; *see Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759-60, 36 L.Ed.2d 656 (1973) (applying *Morrissey* to probation revocation proceedings).

By themselves, these cases probably foreshadowed our court's holding in *Proffitt* and provided a reasonable basis for the confrontation clause claim Moore seeks to present at this time. Indeed, this type of claim was recognized by many commentators and attorneys well before Moore filed his first federal habeas corpus petition in late 1978. *See, e.g., United States v. Fischer*, 381 F.2d 509, 511 (2d Cir. 1967) (rejecting petitioner's confrontation clause claim involving non-capital sentencing hearing, but acknowledging that "there is a certain amount of persuasiveness to his argument"), *cert. denied*, 390 U.S. 973, 88 S.Ct. 1064, 19 L.Ed.2d 1185 (1968); *People v. Perry*, 36 N.Y.2d 114, 119, 324 N.E.2d 878, 880, 365 N.Y.S.2d 518, 520-21 (1975) (noting and rejecting defendants' confrontation clause challenge involving non-capital sentencing); *State v. Short*, 12 Wash. App. 125, 528 P.2d 480, 483-84 (1974) (same), *review denied*, 85 Wash.2d 1002 (1975); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 Tex.L.Rev. 1, 1-16 (1968) (viewing *Mempa v. Rhay* as the precursor to expanded constitutional protections at the sentencing stage of criminal trials); Taparauskas, *An Argument for Confrontation at Sentencing: Bringing the Offender into the Sentencing Process*, 8 Cumb.L.Rev. 403, 426-38 (1977) (contending that Supreme Court decisions of the 1960s and 1970s foreshadowed the extension of confrontation rights to sentencing); *see also Clements v. Turner*, 364 F.Supp. 270, 275 (D.Utah 1973) ("On the heels of [*Mempa v. Rhay*,] which held that appointed counsel is required in deferred sentencing situations, has come an expansion of the right to counsel beyond even the broad limits placed upon it in that case and an expanded application of the procedural

safeguards of notice, hearing, confrontation and cross-examination in the context of post-conviction proceedings."); *State v. Ortez,* 60 Haw. 107, 588 P.2d 898, 908 (1978) (noting that defendant had made no request for confrontation and cross-examination at sentencing proceeding); ABA Standards Relating to the Administration of Criminal Justice, Sentencing Alternatives and Procedures 348, 367 (Comp.1974) (discussing right to confrontation at sentencing), *cited in* Taparauskas, *supra,* p. 873, at 439-40.[33]

Even if these lower court cases, commentaries, and arguments of counsel, along with the Supreme Court's decisions in *Mempa, Morrissey, and Gagnon,* were not sufficient by themselves to provide any reasonable attorney with the tools to fashion a *Proffitt* claim, two additional factors compel the conclusion that a *Proffitt* claim was available in 1978. As I noted in discussing Moore's *Estelle v. Smith* claim, *see supra* Part IV.B., Moore's habeas attorney should also have been prompted to raise a *Proffitt* claim (1) because Moore was convicted of a capital crime and (2) because the Supreme Court handed down *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), more than one year before Moore brought his habeas petition in federal court.

In light of the special nature of capital punishment, a reasonable attorney would have been more likely to press a confrontation clause argument with regard to capital sentencing than with regard to non-capital sentencing. *See*

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33. My comments in note 32 *supra* apply with equal force to the discussion in this portion of my opinion.

supra Part IV.B. Given the consequences of a capital sentencing proceeding, Moore could readily have argued that he must have the right to cross-examine a witness whose testimony might determine whether he receives the death penalty or life imprisonment. Moreover, *Gardner* invited this claim through its careful reading of the 1949 decision in *Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). *Williams* held that due process does not require confrontation and cross-examination protections during sentencing proceedings, at least when no objection was made on this ground and background information in the defendant's presentence report was disclosed to the defendant during the proceeding. *Id.; see also Gardner,* 430 U.S. at 355-56, 97 S.Ct. at 1203-04 (plurality). Significantly, *Gardner* noted that the constitutional protections applicable to capital sentencing were evolving, a fact recognized in *Williams. See Gardner,* 430 U.S. at 356-57, 97 S.Ct. at 1204 (quoting *Williams,* 337 U.S. at 247-48, 69 S.Ct. at 1083); *see also* Note, Gardner v. Florida: *The Application of Due Process to Sentencing Procedures,* 63 Va.L.Rev. 1281, 1283 (1977) (hereinafter Note, *Due Process in Sentencing*). The Court in *Garner* then proceeded to discuss cases recognizing the unique nature of capital punishment, and the post-*Williams* cases —including *Mempa*—that extended due process protections to sentencing. In light of this discussion in *Gardner,* and its holding that due process requires that defendants be given an opportunity to explain, rebut, or deny information contained in presentence reports, *Gardner,* 430 U.S. at 362, 97 S.Ct. at 1207, a confrontation clause challenge to capital-sentencing proceedings should have been

obvious to any reasonably competent attorney.[34] *See* Note, *Due Process in Sentencing, supra,* at 1291 (discussing confrontation and cross-examination as rights that *Gardner* may mandate in capital-sentencing proceedings). Thus, I respectfully dissent from the majority's holding that Moore's *Proffitt* claim is novel.

VI.

Finally, I write separately with regard to the majority's analysis of petitioner's claim based on *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Moore's claim is that his sentencing judge imposed the death penalty in part based on a presentence report that petitioner and his counsel did not have "any meaningful opportunity to review, correct or supplement," in violation of the eighth and fourteenth amendments. As the majority notes, this claim is obviously not based on any new legal development, because *Gardner* was decided before Moore filed his first federal habeas petition. In fact, Moore presented this claim in his first state habeas petition (in 1978), and the state court rejected the claim on the merits, finding that Moore's trial counsel had received a copy of the presentence report prior to his sentencing hearing.

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34. Moreover, Moore's counsel during his first state and first federal collateral attacks was aware of *Gardner* and presented a *Gardner* claim to the state court, claiming that Moore was not given an opportunity to deny or rebut material his presentence report contained. *See infra* Part VI. Surely Moore's counsel could have gone one step further and contended that Moore's sixth amendment rights were violated because he was not given an opportunity to confront and cross-examine witnesses whose statements were included in the report.

When Moore brought his first federal habeas petition, on November 22, 1978, he did not include a *Gardner* claim. This omission appears to have been deliberate, and not an oversight, because the claim is noted in the procedural history portion of that petition and because Moore was represented by the attorney, James C. Bonner, Jr., who had prosecuted his state collateral attack. Moore did not seek to add his *Gardner* claim to his petition until October 1, 1980, when his newly appointed substitute counsel sought leave to amend his petition. The district court denied Moore's motion for leave to amend his petition to add the *Gardner* claim, citing his delay in bringing the claim to federal court, his explicit reference to the claim in the procedural portion of his original petition (which indicated that he was fully aware of it when he filed that petition), and his continuous representation by counsel during his state and federal collateral attacks. *Blake v. Zant,* 513 F.Supp. 772, 805 (S.D.Ga.1981). Another ground upon which the district court relied in denying Moore's motion to amend was that his *Gardner* claim was meritless:

> [C]ounsel made explicit reference to the presentencing report issue in the original habeas petition, thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from [Moore's trial counsel] and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence and the trial transcript, which appears to show that the report was turned over to [Moore's trial counsel], the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination.

Id. (citation omitted). Although the district court did not couch this finding as an alternative basis for rejecting Moore's *Gardner* claim, it clearly viewed that claim as having been fully and correctly litigated in the state court. Moreover, it noted that Moore admittedly could produce no evidence to cast any doubt on the state court's disposition.[35]

In these circumstances, I believe we should view the district court's denial of Moore's motion to amend his habeas petition to add his *Gardner* claim as a disposition on the merits. Accordingly, we can treat his attempt to raise this claim anew as a successive petition. Because Moore has presented no reason why he is entitled to relitigate his *Gardner* claim, the claim should be denied as successive pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases, *see* 28 U.S.C. § 2254 (1982).[36]

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35. On appeal, a panel of this court affirmed the district court's denial of Moore's motion to amend, concluding that the district court did not abuse its discretion. *Moore v. Balkcom*, 716 F.2d 1511, 1526-27 (11th Cir.1983) (on rehearing), *cert. denied*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984). The panel did not discuss the district court's treatment of the merits of Moore's *Gardner* claim.

36. The Supreme Court has recently had occasion to examine and refine the standards governing successive federal habeas corpus petitions, i.e., petitions presenting claims that have already been litigated in a prior federal proceeding. *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). In *Kuhlmann*, a four-justice plurality of the Court concluded that the "ends of justice" mandate consideration of successive petitions only when the petitioner "supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at —, 106 S.Ct. at 2627. Three other justices expressed the view that a colorable claim of factual innocence

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Alternatively, I believe we can affirm the dismissal of Moore's *Gardner* claim on the ground that it is conclusively without merit. As the Supreme Court noted in *Sanders v. United States*, 373 U.S. 1, 15, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963) (citations omitted), the abuse of the writ rules "are not operative in cases where the second or successive application is shown, on the basis of the application, files, and records of the case alone, conclusively to be without merit. In such a case the application should be denied without a hearing."

For the reasons described herein, I would affirm the district court's dismissal of the petitioner's *Gardner* claim.

VII.

In sum, I respectfully dissent from the majority's analysis and disposition of Moore's *Estelle v. Smith* and *Proffitt* claims. In my view, these claims are not based on

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(Continued from previous page)

is not essential to establish that the "ends of justice" warrant reconsideration of a petitioner's previously decided claim. *Id.* at —, 106 S.Ct. at 2634-35 (Brennan, J., joined by Marshall, J., dissenting); *id.* at —, 106 S.Ct. at 2639 (Stevens, J., dissenting). The two remaining justices, Justices Blackmun and White, concurred in the Court's alternative holding, *id.* at —, 106 S.Ct. at 2628-31 (rejecting petitioner's successive claim on the merits), and expressed no view on the need for a colorable claim of factual innocence in a successive habeas petition. Thus, *Kuhlmann* leaves open the proper standard governing successive petitions. In this case, we need not decide whether a colorable claim of factual innocence is an essential prerequisite to a successive habeas petition. Regardless of whether that showing is necessary, Moore's successive *Gardner* claim should not be entertained, because he does not present any new facts or legal developments warranting relitigation of the claim.

"new law," excusing his failure to present them in his first federal habeas petition; the district court acted well within its lawful discretion in concluding that Moore's lack of diligence in prosecuting the claims constituted an abuse of the writ. I also dissent from the court's disposition of Moore's *Gardner* claim, for the reasons expressed herein. Finally, I fully concur in the majority's disposition of Moore's remaining claims.

HILL, Circuit Judge, DISSENTING, in which FAY and EDMONSON, Circuit Judges, join:

"When the right point of view is discovered, the problem is more than half solved." *Ellison v. Georgia R.R.*, 87 Ga. 691, 706-7, 13 S.E. 809, 813 (1891) (Bleckley, Chief Justice).

The right point of view of the issues in this case is this: successive petitions for habeas corpus create a genuine and necessary tension between the institutional desirability of finality of judgment on the one hand and, on the other, society's abhorrence of confinement or other punishment of one who is known to be innocent.

This is not a contrived dispute. It represents the inevitable difficulty in society's accommodation of divergent but valid interests.

In the administration of justice, finality achieved reasonably promptly is important. *See, e.g., Heiser v. Woodruff*, 327 U.S. 726, 733, 66 S.Ct. 853, 856, 90 L.Ed. 970 (1946) (recognizing that res judicata serves sound "public policy that there must be some end to litigation and that when one appears in court to present his case, is fully

heard, and the contested issue is decided against him, he may not later renew the litigation in another court."); *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 245 (1952) (holding that principles of finality create jurisdictional bar to untimely filing of certiorari petition). There are special reasons why finality is a proper goal in criminal justice.

> At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Mackey v. United States, 401 U.S. 667, 690-91, 91 S.Ct. 1160, 1178-79, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring).

In civil litigation, even a supported protest that the judgment wrongfully deprives one of property or other freedom of action is usually disregarded if that judgment has reached finality. Finality is that important. *Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522, 525, 51 S.Ct. 517, 517, 75 L.Ed. 1244 (1931) (in civil litigation court noted: "Public policy dictates that there be an end to litigation;

that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between parties."); *Bennett v. Commissioner*, 113 F.2d 837, 840 (5th Cir.1940) ("[T]he rule of *res judicata* does not go to whether the judgment relied on was a right or wrong decision. It rests on the finality of judgments in the interest of the end of litigation and it requires that the fact or issue adjudicated remain adjudicated.").

In this country, we acknowledge that our institutions must be fallible because they are the workings of fallible humans and not monarchs divinely appointed. While some risk of the wrong result must be taken in the administration of justice, we recoil from the imprisonment or punishment of one whose innocense can be demonstrated.

Given the right point of view—that this tension must exist in habeas corpus litigation—we see that it has been the task of Congress to relieve the tension to the extent proper. In my view the Congress has done that in its provisions for our dealing with successive habeas corpus petitions. 28 U.S.C. § 2244(a), (b) (1982).

First, these enactments do not disturb the authority of the judicial branch to hear and decide, on first federal petition for habeas corpus, claims of constitutional error in the state court proceedings. Unless limited by some other provision or precedent, *see Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), relief may be granted from state custody where there has been grievous denial of constitutional rights whether or not the petitioner asserts innocence. I take no issue with that; it is compelled by controlling Supreme Court precedent.

What is subject to our resolution today is the availability of successive petitions. Legislative history makes it clear that in 1966, congressional amendment to section 2244 was to achieve "a greater degree of finality of judgments in habeas corpus proceedings" and to add to section 2244 "provisions for a qualified application of the doctrine of *res judicata*." S.Rep. No. 1797, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S.CodeCong. & Admin.News 3663, 3664.

Congress successfully accommodated these tensions. It gave the courts authority to refuse to hear petition after petition after petition for the writ of habeas corpus brought by state prisoners, whether claiming innocence or not. However, the establishment of finality in these cases carry the risk that one who is demonstrably innocent may yet be incarcerated only because there is no procedure for obtaining a release order. Therefore, whatever may have been the history of the post-conviction litigation in state or federal court, a U.S. district judge is authorized to accept, hear and consider a successive and even abusive petition for the writ of habeas corpus by a state prisoner should the "ends of justice" require it.

In my view, the meaning of the 1966 amendment must be discovered here by reference to the problem being addressed. If the courts conclude that a determination of the existence *vel non* of "ends of justice" will depend upon whether or not the petitioner claims and offers to prove his innocence, then the goal of finality will have been achieved as far as reasonably possible. The innocent will have a "safety valve" from finality; the guilty will have reached the end of litigation.

In the context of death penalty habeas corpus litigation, one may be guilty of murder and yet not subject to the death penalty. Thus, when I advocate that a district judge ought to be able to hear a petition brought by one claiming innocence, I would interpret "innocence," where the death penalty is involved as being innocent of any statutory aggravating circumstance essential to eligibility for the death penalty.

The petitioner in this case makes no claim of innocence; he long ago and promptly confessed to murder accompanied by statutory aggravating circumstances. For the reasons stated above, therefore, and for the reasons so much better articulated in parts II and III of the opinion of Justice Powell in *Kuhlmann v. Wilson*, 477 U.S. 436, —, 106 S.Ct. 2616, 2622-28, 91 L.Ed.2d 364 (1986), I would affirm the district court's judgment dismissing the petition.

For these reasons I respectfully DISSENT.

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8423

WILLIAM NEAL MOORE,

Petitioner-Appellant,

versus

RALPH KEMP,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING
(Filed October 7, 1987)

BEFORE: RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellee, Ralph Kemp, is denied.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

No. 87-1104

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RALPH KEMP, WARDEN,

Petitioner,

-against-

WILLIAM NEAL MOORE,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh ~~Circuit~~

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 87-1104

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RALPH KEMP, WARDEN,

Petitioner,

-against-

WILLIAM NEAL MOORE,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondent William Neal Moore respectfully requests this Court to deny the petition for writ of certiorari filed by petitioner Ralph M. Kemp. Respondent Moore is filing a cross-petition for writ of certiorari contemporaneously with this brief; he seeks certiorari on that cross-petition only if the Court agrees to grant petitioner Kemp's petition for certiorari.

STATEMENT OF FACTS

Judge Godbold's opinion for the Court of Appeals is, in essence, an intermediate order. It does not grant final relief to Mr. Moore on any ground. Instead, it affirms the dismissal of two constitutional claims (App. 67-68)[1]; remands two additional claims for a consideration of their merits (App. 59, 61); and remands a final claim for consideration of whether the merits should be addressed. (App. 67). Because petitioner Kemp characterizes the opinion of the Court of Appeals almost entirely in hyperbolic terms, an additional statement of the facts is necessary.

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1 Each reference to the Appendices to the Petition for Writ of Certiorari in Kemp v. Moore, No. 87-1104, will be indicated by the abbreviation "App."

A. The Court of Appeals' Disposition of the Estelle v. Smith and Proffitt v. Wainwright Claims

The Court of Appeals held that the district court erred by dismissing two of Mr. Moore's claims, without any consideration of their merits, as abuses of the writ. The first of these claims was asserted by Mr. Moore under Estelle v. Smith, 451 U.S. 454 (1981)[2]; the second, under Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir.), cert. denied, 464 U.S. 1003 (1983).[3]

In directing the district court to consider the merits of these claims, the Court of Appeals followed a well-trod path. Both Sanders v. United States, 373 U.S. 1 (1963) and Rule 9(b) of the Rules Governing Section 2254 Cases provide that claims presented in successive habeas petitions should be evaluated pursuant to one of two alternative analyses: the first if the claims have already been adjudicated on their merits in the initial petition; the second if the claims are newly asserted in the second petition. Since the district court found that Mr. Moore had not previously litigated either the Smith or the Proffitt claims (App. 51 n.4), the Court of Appeals first concluded that both claims were newly presented and that the relevant issue was "abuse of the writ . . . under Rule 9 (b)." (App. 51).

The Court then looked to Sanders v. United States, which teaches that "[a]bsent deliberate withholding or intentional abandonment of a claim in the first federal petition, the inquiry

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[2] The Smith claim rests on the failure of a state probation officer "to inform petitioner [Moore] of his right to remain silent and of his right to counsel -- or to secure any knowing and intelligent waiver of those rights -- prior to interrogating him, while he was in custody, for purposes of gathering information relevant to sentencing." (Successive Habeas Petition, para.26). Mr. Moore alleges that these acts and omissions violated his rights guaranteed by the Fifth and Sixth Amendments.(Id.)

[3] The Proffitt claim stems from the State's use of "a presentence report that was presented to the trial court in a written document rather than in open court, by witnesses under oath and subject to cross-examination." (Successive Habeas Petition, para. 43). Mr. Moore alleges that this course of action violated his rights to confrontation and cross-examination guaranteed by the Fifth, Sixth and Fourteenth Amendments. (Id.).

. . . [concerning] a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal application." (App. 51-52).[4] Paraphrasing Fay, the Court of Appeals declared that an "evaluation of a petitioner's conduct necessarily hinges on the petitioner's awareness of the factual and legal bases of the claim."

The en banc Court, however, rejected a focus solely on Mr. Moore's subjective knowledge of available law. Instead, because he had been represented by counsel, the Court of Appeals expressly held that Moore was "chargeable with counsel's actual awareness . . . and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition." (App. 52-53) (emphasis added).

After reviewing these controlling legal precedents, the Court of Appeals turned to their application. It first considered whether a reasonably competent counsel should have been chargeable with knowledge of an Estelle v. Smith claim in 1978, when Mr. Moore filed his initial federal petition. Reviewing the state of the law at that time, the Court held:

> [I]n November, 1978, two and a half years before Estelle v. Smith, 451 U.S. 454 (1981), reasonably competent counsel preparing the first petition could not reasonably have been expected to foresee the fifth and sixth amendment implications of Moore's presentence interview. In particular, counsel is not chargeable with an anticipation of the potential intersection of Miranda v. Arizona, 384 U.S. 436 (1966) with the sentencing phase of a bifurcated Georgia capital murder trial.

(App. 53).

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[4] In Sanders, this Court held that "if a different ground is presented by the new application ... consideration of the merits can be avoided [only] . . . if a prisoner deliberately withholds one of two grounds . . . [or] deliberately abandons one of his grounds at the first hearing." 373 U.S. at 17-18, citing Townsend v. Sain, 372 U.S. 266, 291 (1963) and Fay v. Noia, 372 U.S. 391, 438-40 (1963). Townsend provides that newly discovered evidence should be considered on the merits in a federal hearing "[i]f, for any reason not attributable to the inexcusable neglect of petitioner, [the evidence] . . . was not developed" at the prior, state hearing. 373 U.S. at 317. Fay expressly incorporates the standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938) -- requiring "an intentional relinquishment or abandonment of a known right or privilege," -- into the consideration of whether a claim should be heard.

The Court of Appeals observed, in support of this holding, that "[i]t was not immediately obvious," after this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), whether " the constitutional protections normally accorded to a defendant's merits trial would be applied to sentencing phases in general, or Georgia's in particular." (App. 54). Only with time were guilt phase protections extended, as in Estelle v. Smith, to the sentencing phase. The Court specifically noted, in fact, that two of the three principal cases relied on in Estelle v. Smith--Presnell v. Georgia, 439 U.S. 14 (1979) and Green v. Georgia, 442 U.S. 95 (1979) -- were not announced until "after Moore's first federal habeas petition was filed in 1978" (App. 54-55), and that the third case -- Gardner v. Florida, 430 U.S. 349 (1977), was no more than a plurality decision. (App. 55).

Marshalling other authority to illustrate the novelty of the Estelle ruling, the Court of Appeals recalled that "[i]n 1980, two years after Moore filed his first petition, the State of Texas was arguing before the United States Supreme Court in Smith that Smith 'was not entitled to the protection of the Fifth Amendment because . . . the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial.'" (App. 55-56). The Court of Appeals also recalled that in Gray v. Lucas, 677 F.2d 1086, 1096 n.9 (5th Cir. 1982), the Fifth Circuit rejected a claim that Gray's trial counsel had been ineffective because he had not foreseen Smith in 1976. (App. 56).

In sum, the Court of Appeals declined to "charge Moore with the knowledge of the legal basis of this claim at the time of his first petition and therefore h[e]ld that his conduct in omitting the claim was not an abuse of the writ warranting dismissal under Rule 9(b)." (App. 59).

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The Court of Appeals applied a similar analysis to Mr. Moore's claim under Proffitt v. Wainwright, which extended Chambers v. Mississippi, 410 U.S. 284 (1973) and similar cases to the sentencing phase of capital cases. Proffitt was not

announced by the Eleventh Circuit until September of 1982, five months after the district court had disposed of Mr. Moore's first federal petition. Under those circumstances, the Court of Appeals held that Mr. Moore's failure to include the Proffitt claim in his first federal petition was not an abuse of the writ.

B. The Court of Appeals' Disposition of the Gardner v. Florida Claim

The Court of Appeals subjected Mr. Moore's Gardner v. Florida claim to a different analysis, since "Gardner was decided in 1977 [and] therefore . . . is not [a] claim based on alleged 'new law' declared since the first petition." (App. 61). The Gardner claim was, in fact, included in Mr. Moore's initial state habeas petition, but it was subsequently omitted by volunteer counsel from Moore's initial federal petition. (App. 61). That volunteer counsel soon abandoned his representation of Mr. Moore; when Moore managed to obtain new volunteer counsel in 1980, the new counsel immediately moved to amend the federal petition to raise the Gardner claim. Although Mr. Moore's initial petition was still pending (and was not acted upon until seven months after new counsel filed the motion to amend), the district court refused to grant the motion.

In her dissent from the panel opinion on this appeal, Judge Kravitch observed that "the omission of [the Gardner claim] may not be attributed to intentional withholding or inexcusable neglect, for it is evident that Moore actively sought to have the district court address the claims during the pendency of his first habeas proceeding." (App. 38). Nevertheless, a majority of the full Court of Appeals reasoned that Mr. Moore's unsuccessful attempt to amend his first federal petition to add the Gardner claim was "at most a factor to be considered in answering the question of whether that claim may be denied in the [second] petition on abuse of the writ grounds." (App. 63). The Court concluded, "We cannot say that the district court . . . erred in finding that the failure to include this claim in the first petition was an abuse of the writ." (App. 64).

The majority went on to note, however, that even when abuse of the writ has been found, Rule 9(b) directs a habeas court to determine whether the "ends of justice" might require the claim to be heard on its merits. The Court turned for guidance to the three-judge plurality of the Court in Kuhlmann v. Wilson, 477 U.S. 436 (1986), which suggested that "the ends of justice" might require a "colorable showing of factual innocence." (App. 65).

The Court of Appeals deferred a final holding on whether factual innocence would in all cases be a necessary condition for the application of the ends-of justice-exception. (App. 65). It nevertheless proceeded to evaluate Mr. Moore's claim as if he were obligated to meet the Kuhlmann standard to prevail. Noting that "[s]ome adjustment is required to apply this test . . . to alleged constitutional errors in capital sentencing," (App. 65), the Court of Appeals sought illumination from this Court's opinions in Smith v. Murray, 477 U.S. 527 (1986) and Murray v. Carrier, 477 U.S. 478 (1986), which ask -- in circumstance where counsel has failed without "cause" to object at trial to a constitutional violation -- whether

> the alleged constitutional error . . . precluded the development of true fact . . . [or] resulted in the admission of false ones.

Smith v. Murray, supra, 477 U.S. at 556.

The Court of Appeals adopted this strict standard to determine whether the district court should have reached the merits of Mr. Moore's claim. Since the district court had in fact expressly acknowledged a "'sufficient likelihood . . . that a wrongful sentence was imposed based on inadequate information,'" (App. 66; see App. 26-27), and suggested that "'corrected information would have materially altered the profile before the [sentencing] judge,'" (App. 67; see App. 27), the Court of Appeals remanded the Gardner claim. The Court's approach was cautious; because "[t]he district court did not have available to it the guidance given by the Supreme Court in Smith v. Murray," (App. 66), the Court declined to resolve the "ends-of-justice" issue for itself. Instead, it invited the district

court to determine, in the first instance, "whether the ends of justice require it to consider the merits of this claim." (App. 67).

REASONS FOR DENYING THE WRIT

I

THE COURT OF APPEALS FOLLOWED CLEAR, WELL-ESTABLISHED PRECEDENT IN HOLDING THAT MOORE WAS NOT "INEXCUSABLY NEGLECTFUL" WHEN HE FAILED TO ASSERT ESTELLE v. SMITH AND PROFFITT v. WAINWRIGHT CLAIMS IN HIS INITIAL HABEAS PETITION FILED IN MID-1978

Petitioner Kemp contends that certiorari is warranted in this case because "there exists no guidance from this Court as to the type of proof sufficient to establish the 'new law' exception to the abuse of the writ doctrine." (Pet. Cert. 7).[5] While acknowledging that Rule 9(b) and the Advisory Committee Notes to Rule 9 address the new law issue (Pet. Cert. 8-9), Kemp calls for additional case law "to flesh out the concept of 'excusable neglect' or 'inexcusable neglect' with reference to new law claims." (Pet. Cert. 10-11).

Kemp suggests that, because it lacked definitive guidance, the Court of Appeals committed three principal errors, warranting this Court's review. First, he contends, that the Court of Appeals "inappropriately create[d] a subjective, rather than objective, test for determining whether a claim could have been raised previously or is based on 'new law' . . . a standard which focuses predominately [sic] on a petitioner's subjective knowledge . . . rather than a petitioner's actual conduct." (Pet. Cert. 11). Second, Kemp claims, the Court's new standard removed "the burden of proof . . . from the petitioner, and place[d it] on the State." (Pet. Cert. 12). Third, he argues, the Court "graft[ed] the foreseeability requirement of procedural default causes onto the abuse of the writ doctrine . . . dangerously afford[ing] a means for a petitioner to cavalierly excuse his conduct . . . by stating that the legal principle . . . was 'not

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[5] Each reference to he petition for writ of certiorari filed by petitioner Kemp in Kemp v. Moore, No. 87-1104, will be indicated by the abbreviation "Pet. Cert."

foreseeable by counsel.'" (Id.). In sum, Kemp asserts that the Court of Appeals' opinion, if not reviewed, will "allow[] habeas petitioners to use their counsel as convenient excuses . . . [creating] a totally subjective and unworkable standard." (Pet. Cert. 13).

These arguments border on the frivolous. As our Statement of Facts demonstrates, the Court of Appeals proceeded step-by-step to follow the well settled precedents of this Court and Rule 9(b). Read together, Sanders and Townsend expound clearly and in detail both the "new law" standard and the concept of "inexcusable neglect." These standards have proven so straightforward and serviceable that further elaboration has never been deemed necessary. The lower federal courts, including the Eleventh Circuit, have regularly employed them without difficulty. See, e.g., Jones v. Estelle, 722 F.2d 159, 165-67 (5th Cir. 1983)(en banc); McCorquodale v. Kemp, 829 F.2d 1035 (11th Cir. 1987); Adams v. Dugger, 816 F.2d 1493, 1495-96 (11th Cir. 1987)(on rehearing).

Here, the Court of Appeals identified the appropriate standards and correctly applied them to the issues presented by this case: whether Estelle v. Smith and Proffitt v. Wainwright constituted "new law" in mid-1978 when Mr. Moore's first federal habeas petition was filed. The answer to that question, indeed, rests on far more than the basic fact that Smith and Proffitt were not decided for three or more years after Mr. Moore's federal petition was filed. In truth, the entire body of law governing capital sentencing proceedings, as this Court knows, underwent dramatic and unpredictable change in the years between 1976 and 1983. Especially prior to the Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), the full significance of capital sentencing proceedings and the constellation of procedural protections that would eventually be applicable to them had scarcely become apparent. See, e.g., Lockett v. Ohio, 438 U.S. at 602 ("[i]n the last decade many of the States have been obliged to revise their death penalty statutes . . . [t]he

signals from this Court have not, however, always been easy to decipher"); id. at 632 (Rehnquist, J., concurring and dissenting)("[a] majority of the Court has yet to endorse the course [of] . . . using the Eighth Amendment as a device for importing into the trial of capital cases extremely stringent procedural restraints"); Bullington v. Missouri, 451 U.S. 430 (1981)(extending double jeopardy protections for the first time to capital sentencing proceedings); Hitchcock v. Dugger, __U.S.__, 95 L.Ed.2d 347, 352 (1987)(noting the confusion among Florida bench and bar in the late 1970's about the operation of Florida's sentencing procedures).

Petitioner Kemp has in fact cited not a single case, and we know of none, in which the Smith and Proffitt holdings were applied to the sentencing phases of capital trials prior to 1978. To hold that Mr. Moore or his counsel were "inexcusably negligent" for failure to have asserted such claims would have blinked the legal realities as they existed in mid-1978. As this Court cautioned in Strickland v. Washington, 466 U.S. 668, 689 (1984), "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Viewed without benefit of hindsight, the omission of Smith and Proffitt claims in a 1978 federal habeas petition was simply not "inexcusable" conduct for "reasonably competent counsel," since the claims are themselves novel extensions of Eighth Amendment principles that were only beginning in 1978 to assume their present doctrinal form. Cf. Antone v. Dugger, 465 U.S. 200, 206 (1984)(the "applicant hardly can contend that these claims were unknown to him at that time"); Woodard v. Hutchins, 464 U.S. 377 (1984)(same).

The formulation employed by the Court of Appeals for assessing these new-law claims, moreover, is in certain respects less favorable to Mr. Moore than is Sanders itself. Sanders appears to incorporate Fay's requirement that claims may not be foreclosed without evidence of the "considered choice of the petitioner" himself. See Fay v. Noia, 372 U.S. at 439, cited in

Sanders v. United States, supra, 373 U.S. at 18. By contrast, the Court of Appeals held that Mr. Moore was chargeable not only with his own knowledge and that of his counsel but also with "the knowledge that would have been possessed by reasonably competent counsel." (App. 53).

Such a standard, of course, is the antithesis of a "purely subjective test." It does not, as Kemp charges, "focus on a petitioner's subjective knowledge." (Pet. Cert. 11). Instead, it looks to what the habeas applicant or his counsel should have known. Notwithstanding his good faith, a habeas applicant under the Court of Appeals' formulation will be held to have abused the writ if he omits, from his initial petition, claims that ought to have been recognized, but were not. Petitioner Kemp's characterization of the lower court's opinion simply won't fit the facts.

It is impossible seriously to claim, moreover, that the lower court's opinion shifts "the burden of proof . . . on the State," as Kemp charges. Nothing in the language of the majority opinion even addresses the burden-of-proof issue, much less compels a departure from settled law. The Eleventh Circuit, both before and after its decision in Moore v. Kemp, has firmly adhered to the principle that successive habeas applicants must bear the full burden of explaining their failure to have included newly-asserted claims in their initial petitions. See, e.g., McCorquodale v. Kemp, 832 F.2d 543, 544 (11th Cir. 1987) ("[i]f the state alleges abuse of the writ, the burden is on the plaintiff to rebut this contention"); Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir. 1985)(same).

Finally, if anyone appears to advocate "graft[ing] the foreseeability requirement of procedural default cases onto the abuse of the writ doctrine," it is the Court of Appeals dissenters in Moore, not the majority (Pet. Cert. 12). The dissenters repeatedly employ the language of the procedural default cases (for example citing Reed v. Ross, 468 U.S.1, 17 (1984) for the proposition that "the principles articulated in

Estelle v. Smith, were [not] the type of `"new '"' constitutional rule . . . that might excuse a habeas petitioner." (App. 97)(Tjoflat, J., concurring and dissenting). See also App.104-05 n.32 (citing Engle v. Isaac, 456 U.S. 107 (1982) to fault Mr. Moore's counsel for failing to anticipate Smith.)) The majority, by contrast, plainly recognizes and honors throughout its opinion the distinction between strict rules of procedural forfeiture and the equitably-based principles set forth in Sanders and Rule 9(b).

II

THE MAJORITY'S TREATMENT OF THE "ENDS OF JUSTICE" ISSUE PRESENTED BY MOORE'S GARDNER CLAIM FOLLOWS THE PRECISE ANALYTICAL FRAMEWORK SUGGESTED BY THIS COURT. MOREOVER, THE ISSUE IS NOT RIPE FOR REVIEW

Petitioner Kemp also contends that "this case warrants review with respect to the application of the ends of justice test to successive applications [which] . . . seek to relitigate issues relating to the sentencing phase . . . [that] have been previously adjudicated adversely to the petitioner." (Pet. Cert. 14)(emphasis added).

Mr. Moore is at a loss to discern how this issue could properly be addressed in his case, since the only claim to which Court of Appeals applied an ends-of-justice analysis -- the Gardner v. Florida claim (see App. 64-67) -- is one that no federal court has ever adjudicated on its merits. Whatever the ends of justice may require when, as in Kuhlmann v. Wilson, 477 U.S. 436 (1986), an applicant attempts to secure a second ruling on his constitutional claims, it will not likely govern the disposition of Mr. Moore's Gardner claim, which was never heard or decided by the district court.

Kemp also urges the Court to grant certiorari to consider Judge Hill's suggestion, set forth in his dissenting opinion in this case, that (i) the ends of justice, as the plurality in Kuhlman urged, should require proof of a colorable claim of factual innocence (see App. 14-15, citing App. 119); and (ii) that in capital sentencing proceedings, such a showing should

entail "innocence of any statutory aggravating circumstances." (Id.).

As an initial matter, we must point out that such a holding is not foreclosed to the Court of Appeals, even in Mr. Moore's own case. The judgment of the court merely remands the Gardner claim for further consideration by the district court. If either party is dissatisfied by the district court's eventual holding, the Court of Appeals will have a further opportunity to consider the matter. At every juncture, petitioner Kemp will presumably have a full opportunity to contend for Judge Hill's proposed new rule. To invite this Court, however, to review, at this point, what is presently no more than a remand order, is to urge an imprudent use of the Court's limited certiorari resources.

Furthermore, the tentative analysis suggested by the Court of Appeals in its opinion -- which follows the Court's own analysis of a "fundamental miscarriage of justice" under Murray v. Carrier and Smith v. Murray -- is far more consonant both with the equitable foundations of the Great Writ and with the inherently "subjective 'unique individualized judgment[s]'" required in capital sentencing decisions, Turner v. Murray, __U.S.__, 90 L.Ed.2d 27,35 (1986), than is any mechanical rule that would foreclose all further inquiry once "guilt" of an aggravating circumstance had been found. Moreover, since the district court has suggested that, if the merits of Mr. Moore's claim were reached, it would likely find that "a wrongful sentence [had been] . . . imposed based on inadequate information," (App. 66; see App. 26-27), it would be far preferable for the record to be fully developed before this issue is presented to this Court.

CONCLUSION

The petition for certiorari should be denied.

Dated: January 27, 1988

Respectfully submitted,

Daniel J. Givelber

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No. 87-1104

In The

Supreme Court of the United States

October Term, 1987

WALTER ZANT, WARDEN,

Petitioner,

v.

WILLIAM NEAL MOORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF ON BEHALF OF THE PETITIONER

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Supreme Court of the United States

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF ON BEHALF OF THE PETITIONER

ARGUMENT AND CITATION OF AUTHORITY

THE PARTIES AGREE THAT GUIDANCE IS NEEDED FROM THIS COURT AS TO HOW CONGRESSIONALLY ENACTED RULE 9(b) SHOULD BE INTERPRETED AND APPLIED.

Due to Respondent's concession that the Eleventh Circuit "seriously erred" in its interpretation of Rule 9(b) of the Rules Governing Section 2254 Cases (Resp. Br. 32), Respondent has effectively admitted that the time is ripe

for guidance from this Court as to the interpretation and application of the term "abuse of the writ" as contained in Rule 9(b). Due to the current lack of clear judicial guidance, each federal district court and each petitioner and respondent involved in successive applications for federal habeas corpus relief struggle to interpret what constitutes an abuse of the writ.

The absence of federal judicial guidance available to federal district courts reviewing successive applications is exemplified by Respondent's brief which relies selectively and almost exclusively on Committee Notes interpreting 28 U.S.C. § 2244 and 2244(b) and hearings before the House subcommittee dealing with the interpretation of Rule 9(b). Contrary to Respondent's position, Petitioner is not seeking to usurp congressional authority with reference to the jurisdiction of federal courts to review successive applications, but rather simply requests that this Court recognize and rectify the dearth of judicial authority available for federal district courts to determine when and how they should exercise their discretion to review successive applications on their merits.

Rule 9(b), like all statutes, requires a continuing interpretative process by the courts so that the statute may be applied to specific fact situations and individual cases. *See Barefoot v. Estelle*, 464 U.S. 880 (1983) and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). Petitioner simply requests that this Court build on the congressionally laid foundation of Rule 9(b) in order to guide the discretion of federal district courts attempting to deal with the ever

increasing problem of abuse of the writ, especially in the context of capital litigation.

Respectfully submitted,

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No. 87-1104

In The

Supreme Court of the United States

October Term, 1987

RALPH KEMP, WARDEN,

Petitioner,

v.

WILLIAM NEAL MOORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Certiorari Granted April 18, 1988

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June 4, 1974	Respondent Waives a Trial by Jury and Enters a Plea of Guilty in the Superior Court of Jefferson County, Georgia
July 17, 1974	Following a Sentencing Hearing, Trial Judge Imposes Sentence of Death
February 12, 1975	Convictions and Sentences affirmed by the Supreme Court of Georgia
May 13, 1977	Denial of the Respondent's Motion for Declaratory Judgment Affirmed by the Supreme Court of Georgia
July 13, 1978	Denial of State Habeas Corpus Petition in the Superior Court of Tattnall County, Georgia
October 17, 1978	Denial of Respondent's Application for a Certificate of Probable Cause to Appeal by the Supreme Court of Georgia
November 22, 1978	Filing of Respondent's First Application for Federal Habeas Corpus Relief in the United States District Court for the Southern District of Georgia
June 18, 1979	Hearing on Respondent's First Application for Federal Habeas Corpus Relief
April 29, 1981	Decision of the Federal Habeas Corpus Court Granting Sentencing Relief to Respondent

	as to One of the Claims in the Initial Application
June 23, 1983	Panel of the Eleventh Circuit Reverses District Court Order Granting Respondent a New Sentencing Phase, but Grants Federal Habeas Corpus Relief as to Sentence on Another Ground
September 30, 1983	Panel of Eleventh Circuit Grants Petition for Rehearing and Withdraws Prior Panel Opinion, Substituting New Opinion, Denying Respondent All Relief, in its Place
March 3, 1984	Denial of Certiorari by this Court
May 11, 1984	Filing of Successive State Habeas Corpus Petition in the Superior Court of Butts County, Georgia
May 17, 1984	Hearing on Respondent's Successive State Habeas Corpus Petition
May 18, 1984	Dismissal of Petitioner's State Habeas Corpus Petition as Successive
May 18, 1984	Denial by the Supreme Court of Georgia of Petitioner's Application for a Certificate of Probable Cause to Appeal
May 18, 1984	Filing of Second Application for Federal Habeas Corpus Relief in the United States District Court for the Southern District of Georgia

May 21, 1984	Hearing in the United States District Court for the Southern District of Georgia
May 22, 1984	District Court Denies Respondent's Application for a Stay of Execution, Denies Respondent Habeas Corpus Relief, Finds Certain Allegations to Constitute an Abuse of the Writ and to be Waived, but Grants Respondent's Application for a Certificate of Probable Cause to Appeal
May 22, 1984	Respondent Files Notice of Appeal in the Eleventh Circuit
May 24, 1984	Oral Argument Conducted Before a Panel of the Eleventh Circuit
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STATE OF GEORGIA	)	IN THE SUPERIOR
	)	COURT OF JEFFERSON
vs.	)	COUNTY, GEORGIA.
	)	Indictment Number Three
WILLIAM NEAL MOORE	)	May Term 1974
	)	Charges:
	)	Count #1: Murder
	)	Count #2:
	)	Armed Robbery

ARRAIGNMENT

IN OPEN COURT, June 4, 1974, the Honorable Walter C. McMillan, Jr. Judge, Jefferson Superior Court, Middle Judicial Circuit of Georgia, presiding.

APPEARANCES

FOR THE STATE:

Hon. H.R. Thompson, District Attorney,
Jefferson Superior Court, M.J.C.
Swainsboro, Georgia 30401

FOR THE DEFENDANT:

Mr. Hinton R. Pierce, Esq.,
213 Southern Finance Building
Augusta, Georgia

(p.1) PROCEEDINGS:

THE DEFENDANT, WILLIAM NEAL MOORE, having been brought into Court, and standing before the Bar with his counsel, Mr. Hinton R. Pierce, Esq., and the State having called the case for arraignment;

By The Court: You are William Neal Moore?

By The Defendant: Yes, sir.

By The Court: You are charged here in Jefferson Superior Court in an indictment returned at the May Term nineteen seventy-four by the Grand Jury of Jefferson County Georgia, in County One, that you did on the second day of April nineteen seventy-four, kill one Fredger Stapleton by shooting the said Fredger Stapleton with a certain pistol, contrary to the laws of the State of Georgia, the good order, peace and dignity thereof, and in County Two, that you did, on the second day of April nineteen seventy-four, unlawfully and with the intent to commit a theft, took from the person of (p.2) Fredger Stapleton five thousand dollars in cash money, a single barrel shotgun, and all of the total value of five thousand, seven hundred and thirty dollars, by the use of a pistol, contrary to the laws, peace and dignity thereof. Now, who is your lawyer?

By The Defendant: Mr. Pierce.

By The Court: All right, your attorney is Mr. Pierce, is that the gentleman standing next to you?

By The Defendant: Yes, sir.

By The Court: You understand the nature of these charges against you?

By The Defendant: Yes, sir.

By The Court: And how do you plead, guilty or not guilty?

By The Defendant: Guilty.

By The Court: You plead guilty?

By The Defendant: Yes, sir.

By The Court: Have you advised him the consequences of a plea of guilty, Mr. Pierce?

By Mr. Pierce: I have, yes, sir.

By The Court: He understands that he could be sent to the electric chair?

By Mr. Pierce: Yes, sir.

By The Court: Or life imprisonment?

By Mr. Pierce: Yes, sir.

By The Court: All right, what do you say, Mr. Thompson?

By The District Attorney: If Your Honor please, the State will have no objection to accepting at this time pleas of guilty, but for the sentencing to be imposed by a (p.2) Jury. The State intends in this case to seek the dealth penalty, and the State will not waive that right. If the Court wants to hear the facts and make a determination, then it's within the purview of the Court on a plea of guilty to do so, but other than the Court accepting the responsibility for a total sentence, we would ask that a Jury be impannelled for the purpose of setting punishment.

By That Court: What do you say to that, Mr. Pierce?

By Mr. Pierce: Your Honor, we take the position that the Defendant has the right to waive a Jury trial. Under the laws of Georgia, any person who is indicted for an offense punishable by death can enter a plea at anytime after indictment has been returned, section

twenty-six, thirty-one ough two. It says punishment can be imposed by the Judge. Under this position that we take, we waive any Jury trial.

By The Court: What do you say, Mr. Thompson?

By The District Attorney: Well, that puts it directly into the lap of the Court.

By The Court: All right, sir, let the plea be entered. If I'm supposed to do it, then I will weigh it and decide.

By The District Attorney: We will let the plea be entered.

By The Court: All right.

WHEREUPON, Mr Pierce and the Defendant sign the plea.

By The Court: I think you should complete this form here.

WHEREUPON, THE DEFENDANT executed the questionnaire form, attached hereto as Exhibit A, page eight.

(p.4) By The Court: All right, sir, did you complete that form?

By The Defendant: Yes, sir.

By The Court: Your name is William Near Moore?

By The Defendant: Yes, sir.

By The Court: You are charged with the offense of Murder and Armed Robbery here in Jefferson Superior Court?

By The Defendant: Yes, sir.

By The Court: And are you able to hear and understand my statements and questions?

By The Defendant: Yes, sir.

By The Court: Are you now under the influence of any alcohol, drugs, narcotics, or other pills?

By The Defendant: No, sir.

By The Court: Do you understand what you are charged with in these cases, that is, Armed Robbery and Murder?

By The Defendant: Yes, sir.

By The Court: Do you understand that upon your pleas of guilty you could be imprisoned for as much as life or given death by the electric chair?

By The Defendant: Yes, sir.

By The Court: Has the District Attorney, or your lawyer, or any policeman, law officer or anyone else made any promise to you to influence you to plead guilty in these cases?

By The Defendant: No, sir.

By The Court: Has the District Attorney or your lawyer or any policeman, law officer or anyone else made any threat to you to influence you to plead guilty in (p.5) these cases?

By The Defendant: No, sir.

By The Court: Have you had time to confer, and have you conferred with your lawyer about these cases?

By The Defendant: Yes, sir.

By The Court: And who is your lawyer?

By The Defendant: This man right here, sir.

By The Court: Hinton Pierce?

By The Defendant: Yes, sir.

By The Court: Are there witnesses that you desire to appear in your behalf in these cases?

By The Defendant: No, sir.

By The Court: Do you authorize and instruct your lawyer to enter pleas of guilty?

By The Defendant: Yes, sir.

By The Court: And how do you plead to these charges, guilty or not guilty?

By The Defendant: Guilty.

By The Court: Are you satisfied with the services of your attorney as rendered in your behalf?

By The Defendant: Yes, sir.

By The Court: And are you in fact guilty of the offenses of Murder and Armed Robbery?

By The Defendant: Yes, sir.

By The Court: And have these questions been read to and explained to you?

By The Defendant: Yes, sir.

(p.6) By The Court: Do you understand also that you have a right to be tried by a Jury?

By The Defendant: Yes, sir.

By The Court: And if that Jury in fact determines that you are guilty, then they would make the determination as to whether or not you would serve life in the penitentiary or death in the electric chair?

By The Defendant: Yes, sir.

By The Court: Or be turned loose, if they find you not guilty, of course, they would turn you loose.

By The Defendant: Yes, sir.

By The Court: Now, you understand that you have the right to be tried by that Jury and they make that determination, the Jury of twelve people that would be impannelled from this county?

By The Defendant: Yes, sir.

By The Court: Now, you are waiving that right of a Jury trial?

By The Defendant: Yes, sir.

By The Court: And the determination of punishment?

By The Defendant: Yes, sir.

By The Court: And you are placing that responsibility on me, that is the Judge of the Court, to decide whether or not you receive death in the electric chair or life imprisonment?

By The Defendant: Yes, sir, I do.

By The Court: You are making a voluntary waiver of that?

By The Defendant: Yes, sir.

(p.7) By The Court: You have discussed that with your attorney?

By The Defendant: Yes, sir, I did.

By The Court: Now, raise your right hand, please?

WHEREUPON, THE DEFENDANT raises his hand and the oath was administered by the Court.

By The Court: The statements that you have just made to me and the statements contained in this affidavit are true, so help you God?

By The Defendant: Yes, sir.

By The Court: So help you God?

By The Defendant: So help me God.

By The Court: All right, I'll ask you that you sign this down at the bottom there in the presence of the Clerk, date it and sign it.

WHEREUPON, THE DEFENDANT signs the affidavit in the presence of the Clerk, attached hereto as Exhibit A, page eight.

By The Court: All right, when do we want to hear this?

By The District Attorney: Any time will suit us, Your Honor.

By Mr. Pierce: Your Honor, I would like to have the opportunity to have some of his family to come down.

By The Court: Well, of course, and I think I will have to hear all of the evidence, and make the determination based on hearing the evidence, I couldn't just arbitrarily. . . .

By The District Attorney: You will have to hear all the evidence and make the determination as to whether or not there is sufficient evidence, you have to make an independent determination and then impose whatever sentence the Court wishes.

STATE OF GEORGIA	)	IN THE
COUNTY OF JEFFERSON	)	SUPERIOR COURT
STATE OF GEORIGA	)	JUNE TERM, 1974
	)	CASE NO. ___
VS.	)	OFFENSE Murder &
WM. NEAL MOORE	)	Armed Robbery
	)	TRANSCRIPT

The defendant, being sworn, makes the following answers to the Court:

(1) Are are able to hear and understand my statements and questions?
Answer: Yes

(2) Are you now under the influence of any alcohol, drugs, narcotics or other pills?
Answer: No.

(3) Do you understand what you are charged with in this case?
Answer: Yes.

(4) Do you understand that upon your plea of guilty you could be imprisoned for as much as life years? (or Death)
Answer: Yes.

(5) Has the District Attorney, or your lawyer, or any policeman, law officer or anyone else made any promise to you to influence you to plead guilty in this case?
Answer: No.

(6) Has the District Attorney, or your lawyer, or any policeman, law officer or anyone else made any threat to you to influence you to plead guilty in this case?
Answer: No.

(7) Have you had time to confer, and have you conferred with your lawyer about this case; and who is your lawyer?
Answer: Yes, My Lawyer is Hinton Pierce, ___, Augusta, GA.

(8) Are there witnesses you desire to appear in your behalf in this case?
Answer: No.

(9) Do you authorize and instruct your lawyer to enter a plea of guilty?
Answer: Yes.

(10) How do you plead to the charge, guilty or not guilty?
Answer: Guilty.

(11) Are you satisfied with the services of your attorney as rendered in your behalf?
Answer: Yes.

(12) Are you in fact guilty?
Answer: Yes.

(13) Have these questions been read to and explained to you?
Answer: Yes.

I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open court, and they are true and correct.

/s/ William N. Moore
DEFENDANT

Sworn to and subscribed before me this 4th day of June, 1974.

Illegible.

Illegible.

CERTIFICATE

The undersigned Presiding Judge hereby certifies:

I. That the above-named defendant was sworn in open court and the questions were asked him as set forth in the foregoing transcript, and the answers given thereto by said defendant are as set forth therein.

II. That the defendant, William Neal Moore, being represented by attorney Hinton R. Pierce, who was ~~(court appointed) or~~ (privately employed), plead guilty ~~(nolo contendere)~~ as charged in the (bill of Indictment) ~~(Accusation) (or) to the lesser offense of~~ Murder & Armed Robbery, and in open court, under oath, further informs the Court that he is and has been (1) fully advised of his rights and the charges against him; (2) the maximum punishment for said offense charged, and for the offense to which he pleads guilty ~~(nolo contendere)~~; (3) that he is guilty of the offense to which he pleads guilty ~~(nolo contendere)~~; (4) that he authorizes a plea of guilty ~~(nolo contendere)~~ to said charge; (5) that he has had ample time to confer with his attorney, and to subpoena witnesses desired by him; (6) that he is ready for trial; (7) that he is satisfied with the counsel and services of his attorney.

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of guilty ~~(nolo contendeter)~~ by the defendant is freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency. It is, therefore,

ordered that his plea of guilty ~~(nolo contendere)~~ be entered on the minutes, and that this Transcript and Certificate be filed with the (indictment) ~~(Accusation)~~.

Date: July 17, 1974.

/s/ Walter C. McMillan, Jr.
JUDGE PRESIDING

Filed in Office
July 17, 1974
Illegible

By The Court: All right, we can hear the evidence on July the seventeenth.

THERE BEING NOTHING FURTHER AT THE ARRAIGNMENT HEARING, JULY THE SEVENTEENTH WAS SET FOR HEARING PRELIMINARY TO SENTENCING.

COURT REPORTER'S CERTIFICATE

GEORGIA, JEFFERSON COUNTY:

I hereby certify that the foregoing is a true, complete and correct transcript of the proceedings taken down by me in the case aforesaid.

This the 23rd day of July 1974.

/s/ George E. Clark

FILED IN OFFICE THIS 14 DAY OF August 1974.

/s/ Mildred Illegible, Deputy
Clerk, Jefferson Superior Court

GEORGIA, JEFFERSON COUNTY:

I hereby certify that the above and foregoing pages contain the original copy of the Court Report's transcript as filed in this office.

Witness my signature and the seal of said Court. affixed this the ___ day of ___ 1974.

/s/
Clerk, Jefferson Superior Court

STATE OF GEORGIA	) IN THE SUPERIOR
	) COURT OF JEFFERSON
vs.	) COUNTY, GEORGIA.
	) Indictment Number Three
WILLIAM NEAL MOORE	) May Term 1974
	) Charges:
	) Count #1: Murder
	) Count #2:
	) Armed Robbery

IN OPEN COURT - JULY 17, 1974

A Hearing Preliminary to sentencing, The Honorable Walter C. McMillan, Jr., Judge, Jefferson Superior Court, Middle Judicial Circuit of Georgia, presiding.

REPORTER'S TRANSCRIPT

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Wrens, Georgia 30833

FOR THE DEFENDANT:

Mr. Hinton R. Pierce, Esq.,
Attorney at Law,
213 Southern Finance Building
Augusta, Georgia 30902

(p.1) PROCEEDINGS:

By The Court: Are you ready to proceed, Mr. Thompson?

By The District Attorney: The State's ready, Your Honor, and I would like to announce that Mr. John C. Walden, an attorney at Law in Wrens, is associated with the State in this matter, being a representative of the family of the deceased.

By The Court: All right, sir. I call the case of the state of Georgia versus William Neal Moore, charged with the offenses of Murder and Armed Robbery. Back on June the fourth, nineteen seventy-four, the Defendant entered pleas of guilty to both counts of burglary and armed robbery, indicating under the pleas as

indicted at the May Term nineteen seventy-four, at that time, Mr. Moore, I believe you completed this form, this affidavit and signed it in the presence of the Clerk, and you swore at that time that you were able to hear and understand the statements and questions, you were not then under the influence of alcohol, drugs, narcotics or other pills, that you understood what you were charged with and that you understood that upon your pleas of guilty you could be imprisoned for as much as life or be given death by electrocution, that the District Attorney, or you lawyer nor anyone else had made any promises to you to influence you to plead guilty in these cases, and that no one had made any threats or (p.2) promises to you to induce you to plead guilty in these cases, that you had had time at that time to talk to your lawyer about these cases, and your lawyer was Hinton Pierce, two thirteen Southern Finance Building, Augusta, Georgia, and stated then that there were no witnesses you desired to appear in your behalf, and that you did authorize and instruct your lawyer to enter pleas of guilty for you in these cases, and you were asked the question, how do you plead to these charges, guilty or not guilty, and you said you were guilty, and that you were satisfied with the services of your attorney as rendered in your behalf, and that you stated that you were in fact guilty of the crimes as alleged in this bill of indictment, and that these questions had been read and explained to you, and in addition to that, I asked you were the statements contained in this affidavit true and correct and they are true and correct today as they were on the fourth of July nineteen seventy-four?

By The Defendant: Yes, sir.

By The Court: Now, you understand, of course, that you have the right to have the case submitted to a Jury and the Jury would determine, if you plead not guilty, the Jury would determine your guilt or your innocence, and should they determine that you are guilty or should you plead guilty and ask the Jury to impose (p.3) the sentence upon you, then later the Jury would be required to pass on the decision as to whether or not you would receive life imprisonment or the electric chair, you have the right, however, to waive Jury trial, throw yourself on the mercy of the Court, and let the Court pass on it in both cases, whether you get life or whether you get the electric chair. I'll tell you now, and put it on record, I'll give you the opportunity to at this time withdraw your pleas, and you can plead not guilty, if you like, and withdraw your plea, and if you plead not guilty, the Jury would determine your guilt or your innocence. In the event they determine that you are guilty, then they would make the decision as to whether or not you would receive death by electrocution or life imprisonment, and I'll give you that opportunity now to change you plea if you like, or if you desire to plead guilty and throw yourself on the mercy of the Jury and let the Jury determine the penalty, I'll give you that opportunity now. If you desire to talk with your lawyer about it further, I will give you ample time to talk to him.

WHEREUPON, THE DEFENDANT confers with his lawyer.

By The Defendant: I want to go ahead and let you make the decision.

By The Court: You want to go ahead and let me make the determination?

(p.4) By The Defendant: Yes, sir.

By The Court: You are freely and voluntarily making this choice?

By The Defendant: Yes, sir.

By The Court: All right, sir I'll sign this certificate here that you are freely, understandingly and voluntarily entering your plea of guilty without undue influence, compulsion or duress and without promise of leniency. All right, sir, before we go into the evidence, what I understand the issues will be in the case, it will be necessary for the State to prove beyond a reasonable doubt that the Defendant did in fact on the second day of April nineteen seventy-four kill Fredger Stapleton with a pistol and that the State would be required to prove beyond a reasonable doubt in Count number two the armed robbery, and I believe you stated at arraignment that you intended to ask for the death penalty?

By The District Attorney: If Your Honor please, it is the position of the State that the plea of guilty is an acknowledgment and an admission by the Defendant as to Count one that he committed that crime and as to count two, that he committed that crime. The State will go into the evidence in order to present to the Court the question as to whether or not there is aggravation in this matter sufficient, under the code section, to require the Court to impose the death penalty. It necessarily follows that the evidence (p.5) of the guilt of the

accused as to the commission of the crime, it necessarily follows that that must be presented to the Court in order for the Court to make its determination as to what the punishment will be, but I do submit to the Court that the pleas of guilty speak for themselves.

By The Court: Right, it would have to be corroborated by the evidence as well.

By The District Attorney: On the question of punishment.

By The Court: What do you say to that, Mr. Pierce?

By Mr. Pierce: Your Honor, I think Mr. Thompson is probably correct as far as the factual situation is concerned. I think we are mainly interested in the punishment, the aggravation and so forth, and although the Defendant has plead guilty, and has thrown himself on the mercy of the Court, I think I should state that any objections that I make, are certainly for the record, and in the event there is an appeal made.

By The Court: I certainly understand that.

By Mr. Pierce: I think I should, at this point, before we go any further, raise the point as to the constitutionality of the new law as written in the State of Georgia, even though realizing that the Supreme Court of Georgia has held it to be constitutional. It has not been held so by the Supreme Court of the United State, and I would like to make that point here.

By The Court: All right, sir I think that would be appropriate, do you not agree with that?

(p.6) By The District Attorney: Objecting on the constitutionality of the act that we are now proceeding under?

By The Court: Right.

By The District Attorney: As is relates to State law?

By The Court: Yes, sir, that would be twenty-seven, twenty-five, thirty-four point one, I believe.

By The District Attorney: The State takes the position that this law as it now rests on the statute books of the State of Georgia is constitutional, that it has been held to the State of Georgia in Coley versus the State in two thirty-one, Georgia page eight twenty-nine, that it has been held to be constitutional.

By The Court: All right, sir, any comment you want to make?

By Mr. Pierce: No, sir, Your Honor, I agree with that, but the only thing I say, the United States Supreme Court has not yet ruled on whether or not the Georgia statute is constitutionao (sic), and I would like to reserve any rights the Defendant might have at a later date if that becomes necessary.

By The Court: All right, sir.

By The District Attorney: We are now, in his reservation of rights as to the constitutionality of the act, proceeding only as to the punishment aspect of the law, am I correct?

By Mr. Pierce: That's correct, Your Honor, as to whether or not the death penalty would constitute cruel and inhumane punishment.

(p.7) By The Court: All right, sir, then let's go into the evidence. Mr. Thompson, call your first witness.

By The District Attorney: All right, sir, I call Dr. George Pilcher.

WHEREUPON, DR. GEORGE PILCHER, called as a witness in behalf of the State, being duly sworn, testified:

DIRECT EXAMINATION

BY MR. THOMPSON:

Q. You are Dr. George Pilcher?

A. I am.

Q. For the record Dr. Pilcher, will you state your professional qualifications?

A. I graduated from Georgia Medical College in nineteen thirty-two, and I have been practicing medicine here in Jefferson County as a general practitioner for fifteen years.

Q. As a general practitioner?

A. Right.

By Mr. Thompson: If Your Honor please, I submit that Dr. Pilcher is a qualified, practicing physician in Jefferson County and is competent to testify as an expert witness in this case.

By The Court: All right, sir, do you have any questions concerning his competency?

By Mr. Pierce: No, sir, Your Honor, we will stipulate that Dr. Pilcher is a competent, practicing physician.

By The Court: All right, sir, his qualifications are admitted.

(p.8) Q. Dr. Pilcher, are you also serving as the Medical Examiner of Jefferson County?

A. Yes, sir, I am.

Q. Dr. Pilcher, did you have occasion to see Fredger Stapleton on or about the third day of April nineteen seventy-four?

A. Yes, sir, I saw the body about one P.M. in the afternoon on the date that the body was found. He was fully dressed, laying on the floor in the bedroom, next to the bed.

Q. Now, was this in the home?

A. This was in the home of the deceased.

Q. All right, sir, would you state the condition of the body at the time you found it?

A. The body was cold and stiff, indicating that he had been dead for several hours. There was a large amount of blood of the floor and on the bed, and he had bullet wounds in the face and chest.

Q. Were you able to determine from your examination of the body the cause of death?

A. Not exactly, because I did not do the autopsy, but I read the report of the autopsy. There were bullet wounds in the chest which was consistent with death.

Q. All right, sir, you have seen the autopsy report that was performed by J. Byron Dawson, Ph.D., Assistant Director of the Crime Lab in Atlanta, Georgia?

A. Yes, sir, I saw the report briefly just a minute ago.

Q. All right, sir, in reviewing the report of Dr. Dawson, (p.9) were you able to come to a conclusion as to the cause of death?

A. The cause of death were the two bullet wounds in the lower part of the body here, the lower part here.

Q. Now, you are pointing to yourself on the left and right side, slightly above the nipple?

A. Just about at the nipple, yes, sir.

Q. All right.

A. The wound in the chest here ruptured the major blood vessel and blead (sic) internally, the heart was not penetrated, both lungs were ruptured, and he had an entry here on the chin which came out from his neck, and it was a small wound which I could not identify, but the autopsy report indicated that it was a bullet wound, but it looked to me like a small, stab wound. The bullet wounds in the chest very likely were the cause of death.

By The District Attorney: Your witness, counselor.

CROSS EXAMINATION

BY MR. PIERCE:

Q. From your examination of the body, were you able to conclude that unconsciousness occurred immediately?

A. I think that that would be impossible. I think he could have lived a few minutes, or a little while after.

Q. All right, the small wounds on the chest, could this have been caused from any type of gun pellets?

(p.10) A. It's possible, I couldn't identify it, they were simply small puncture wounds.

By Mr. Pierce: Thank you.

By Mr. Thompson: Just a moment.

REDIRECT EXAMINATION

BY MR. THOMPSON:

Q. Dr. Pilcher, I ask you to look at this series of photographs identified as State's exhibits one through eight and ask you if you can identify the person which is the subject of those photographs?

A. I can.

Q. And who is that?

A. That's the deceased, Fredger Stapleton.

Q. I'll ask you to indicate whether or not those photographs show the room that you have just testified about?

A. Yes, sir.

Q. Dr. Pilcher, these photographs, one through eight, do they clearly depict the body of Fredger Stapleton as it was at the time you saw it on April the third, nineteen seventy-four?

A. Yes, they do.

By Mr. Thompson: Your Honor, with that, I now offer State's exhibits one through eight in evidence.

Note: Mr. Pierce objected to admission of the photographs and then withdrew his objection; the photographs were admitted without objection.

By Mr. Thompson: Your witness.

(p.11) By The Court: Anything further, Mr. Pierce?

By Mr. Pierce: No, sir.

By The Court: You can come down, Doctor. Call your next witness.

WHEREUPON, AGENT H.E. COOK, called as a witness in behalf of the State, being duly sworn, testified:

DIRECT EXAMINATION

BY MR. THOMPSON:

Q. You are Agent H.E. Cook of the Georgia Bureau of Investigation?

A. Yes, sir.

Q. Were you acting in that capacity on or about April the third, nineteen seventy-four?

A. Yes, sir, I was.

Q. In your official capacity as a special agent of the Georgia Bureau of Investigation, did you conduct an investigation into the death of Fredger Stapleton?

A. Yes, sir, I did.

Q. From whom did you receive the report that prompted you to make this investigation?

A. At two P.M. on April the third, I received a radio call from GSP Thomson, advising me that Chief Agent Herndon wanted me to proceed to Jefferson County to assist the Jefferson County authorities in the investigation of a homicide in Wrens, Georgia. I left Augusta and proceeded on to Wrens, Georgia, and arrived at the scene at two forty-seven that same afternoon.

(p.12) Q. All right, sir, and in your own words, will you relate to the Court the investigation you made and your findings and what you did.

A. Yes, sir. Upon arrival, there were several officers there at the residence, and at that time, Agent Hamilton was also there, we arrived about the same time.

Q. Now who is Agent Hamilton?

A. He's a special agent of the Georgia Bureau of Investigation. I took the names of persons there at the scene, their addresses were obtained, and they were later interviewed. Agent Hamilton began photographing the crime scene, and Sheriff Compton and I began a search of the immediate area of the grounds and the

adjacent houses. When we finished this, we placed a call to GSP Thomson, requesting that a pathologist be summoned from the Crime Lab for the purpose of an autopsy and also that Chief Agent Herndon be advised that he would be required to take photographs of footprints, and this sort of thing. They advised us that Agent Hamilton was enroute and that a pathologist would be called from Atlanta.

I returned to the crime scene and at this time, Agent Hamilton was still taking photographs, we continued the search and at this time, Sheriff Compton moved the body and he and his deputies found three slugs which appeared to be thirty-eight calibre. We noted the position which these were found and marked them on a diagram and preserved them for future evidence. There was also some tennis shoe tracks which had been tracked through the blood there on the floor. These were photographed by Senior Agent Herndon and the linoleum was taken up and preserved along with the other evidence. At this time, (p.13) I radioed GSP Thomson and advised that agents Monahan and Ingram would also be needed. I then began to dust for possible latent prints and was able to recover what appeared to be a portion of a palm print from an open window in the front left bedroom of the house, which we considered to be the possible point of entry. This was also preserved as evidence. We finished the investigation of the crime scene search and at approximately five P.M. on the same day, we secured the residence and locked it and boarded it up.

At this time, Agents Monahan and Ingram had arrived and they interviewed several people around in

the neighborhood and Agent Monahan received information from a young, black female name Glinnis White, and she stated that she had gone to bed early and had been awakened by George Curtis and overheard a consersation between Curtis and her sister, Doris White, during which Curtis had stated that his uncle had been shot. This was several hours before the discovery of the body. We also interviewed Doris White. Her story was different from Glinnis'. Doris stated that Curtis had been at the White residence the previous evening, but he left only one time at approximately eight P.M. to get beer and he returned, staying until approximately two A.M. the next morning and at no time mentioned to her anything about his uncle being shot. During this time, Agents Ingram and Hamilton interviewed a subject named Willie James Wiley of Wrens and he advised them that on the previous evening he had been returning home at approximately eleven thirty P.M. when he noted at the laundromat two vehicles, (p.14) one of which he thought to be a small, red vehicle and noted that there was only one person in the laundromat at that time. As he continued to walk down the road and pass by the Stapleton residence, a subject came out from the Stapleton residence walking toward him on Old Stapleton Road in the direction of the laundromat. He gave the agents a description of this subject, and stated that he thought at first the subject was carrying a walking cane, but as he came closer, noted that is was a shotgun. Agents Ingram and Hamilton also receive the names of Larry Wood, Sammy Douglas, Luman Terrell and Robert Neals from Wiley and were advised that these four boys were riding bicycles in the area at

that time and possibly could relay some information to the agents. Agents Ingram and Hamilton then interviewed these four subjects and they stated that they did remember seeing a vehicle parked at the laundromat which they described as a seventy-two or seventy-three, burnt orange Chevy Nova with a black stripe down the side. At this time, a further check was made and it was found that George Curtis who the White sisters had previously mentioned, fit the description given by Wiley and he also lived almost directly behind the Fredger Stapleton residence. Curtis was picked up at this time for questioning and in the course of questioning, the agents discovered that he had been with a subject named William Neal Moore from Fort Gordon that previous evening at the White residence. Curtis stated that Moore owned a Chevrolet Nova fitting the descrıption and that Moore hi self (sic) fit the description given by Wiley. After further questioning, it was discovered that Moore had spoken to Curtis earlier about the amount of (p.15) money carried by Stapleton and also the persons who lived at the Stapleton residence and other information concerning Curtis' uncle, Stapleton. At this time, going with the information which the agents had accrued, a warrant was issued for William Neal Moore for the murder of Fredger Stapleton.

Q. All right, now, stop right there. Now I presume all this investigation that you have been talking about took place in Wrens, Georgia?

A. Yes, sir.

Q. All right.

A. And we obtained the warrant for William Neal Moore and proceeded to Augusta.

Q. And who went to Augusta with you?

A. Sheriff Compton, Deputy Harrell, Senior Agent Herndon, Agents Monahan, Ingram, Hamilton and myself.

Q. All right, sir, before we go into that, who was it that gave you a description of the subject he saw coming out of Stapleton's residence?

A. Willie James Wiley gave us a description of the subject as being between the ages of eighteen to twenty-five, approximately five feet eight, chunky build, a m edium (sic) to short hair. The subject was wearing pants a light colored shirt, short sleeved without a collar and wearing tennis shoes. He further described the individual as being brown skinned, what he referred to as pecan tan.

Q. All right, sir, was anything said about a shotgun?

A. Yes, sir, Wiley stated that when he first observed the young, black male leaving the yard and entering the Old (p.16) Stapleton Road and walking toward Georgia seventeen, he first thought the man was carrying a walking stick, tapping it on the ground, which he later observed and was able to denote that it was a single barrel shotgun carried in a manner as such that it would look like a walking stick.

Q. And what did you observe in the residence about the shotgun?

A. In the living room, there was a table in the middle of the room. I noticed what appeared to be a shotgun blast which struck the pedestal of this table in the living room, and from the direction of the shot, it appeared as though the blast came from the bedroom in which Stapleton was lying, through a doorway, struck the pedestal of the table, and was absorbed by a sofa which was directly across the room.

Q. All right, sir, now who gave you the description of the car?

A. There were four, young black males riding bicycles at this time, around eleven thirty P.M., who were Larry Wood, Sammy Douglas, Luman Terrell and Robert Mills. These subjects stated that they were riding their bicycles that night and they rode by the washerette on the corner of the Old Stapleton Highway and Georgia Highway Seventeen, and observed, parked in the washerette parking lot, an orange colored Nova, approximately a nineteen seventy-three or nineteen seventy-four model, two door, with a black stripe running from the front to the rear of the vehicle on each side. The car was further described as being a dark orange, burnt orange type in color. And they further stated they observed a black, male getting into the (p.17) vehicle with short hair and driving off in the direction of Wrens on Georgia Seventeen.

Q. All right, sir, and I believe you made a drawing of the residence of Fredger Stapleton?

A. Yes, sir, I did.

Q. And is this the drawing you made?

A. Yes, sir, it is.

Q. All right, I'll identify that as State's number nine. And you also made a diagram indicating where the body of Fredger Stapleton was found?

A. Yes, sir.

Q. And is this the drawing you made?

A. Yes, sir, it is.

Q. All right, I'll identify that as States (sic) number Ten.

By Mr. Thompson: If it please the Court, I offer these as State's nine and ten?

By The Court: Any objection?

By Mr. Pierce: We have no objection.

By The Court: All right, let them be admitted without objection.

Q. Do they truly and accurately depict the Stapleton home and the location of the body as you found it when you made your investigation of the premises?

A. Yes, sir, they do, but they are not drawn to scale.

Q. All right, sir and did you obtain any fingerprints there at the scene?

A. Yes, sir, as I said, I dusted for latent prints and was able to recover a portion of a palm print from an open window in the front, left bedroom of the residence. We assumed (p.18) this to be the point of entry. This

window was open when we arrived there, and we assumed that was the point of entry.

Q. Did you later secure a print of the same palm from the person of William Neal Moore for comparison?

A. Yes, sir, we did.

Q. And was a comparison made?

A. Yes, sir, it was.

Q. And what was the result of that comparison?

A. The Crime Lab reported the latent prints submitted were found to be identifiable.

By Mr. Thompson: If Your Honor please, I would like to offer this report from the Crime Lab as State's Number eleven.

Note: The crime lab report was admitted without objection at State's exhibit eleven.

By Mr. Thompson: I will ask the court reporter to mark these as State's twelve through fifteen and relate to the Court what those are.

A. State's photograph twelve is a photograph taken from the position of the body, looking through the front door of the bedroom toward the living room.

Q. All right, sir.

A. Photograph thirteen was taken of the table in the living, room, looking into the bedroom. Photograph fourteen was taken of the front porch, showing the open window. State's fifteen was taken from the porch of the Stapleton residence.

Q. Do these photographs truly depict the scene as you found it to be when you went there on April the third, nineteen seventy-four?

(p.19) A. Yes, sir, they do.

By Mr. Thompson: All right, I would like to tender those in evidence.

By The Court: Any objections?

By Mr. Pierce: No, sir, we have no objection.

By The Court: all right, let them be admitted.

Q. All right, sir, now State's exhibits nine and ten, and with particular reference to the location of the body in State's number ten, did you or did you not see the body lying in that position and did you or did you not make a drawing as the result of a visual observation of the body?

A. Yes, sir, I did.

Q. All right, sir, now was the body deceased at that time?

A. Yes, sir, it was.

Q. In what state and county was this body found?

A. Jefferson County, State of Georgia.

Q. In what state and county was the residence of Fredger Stapleton?

A. Jefferson County, State of Georgia.

Q. Now, you started to testify a few minutes ago that you and Sheriff Compton and Deputy Harrell and

Agent Herndon and the other agents that accompanied you to Augusta, and that the deputy sheriffs of Richmond County also assisted you at that time, would you relate where you were and what you did?

A. Yes, sir, we went to the residence of William Neal Moore in the Crystal Springs Trailer Park, we were taken there by George Curtis. Upon arrival, Agent Ingram and Sheriff Compton (p.20) went up to the door and knocked, and William Neal Moore came to the door, and at that time, Agent Ingram advised Moore that a warrant had been issued for his arrest.

Q. What was the warrant for?

A. For murder.

Q. All right, sir.

Q. And at this time, when he came to the door, Agent Ingram advised Moore that he was under arrest for the murder of Fredger Stapleton and was advised by Agent Ingram of his constitutional rights.

Q. Was that done in your presence?

A. Yes, sir.

Q. You say he was advised of his constitutional rights, what was said to him by Agent Ingram in your presence?

A. Agent Ingram advised him that he had the right to remain silent, that anything he said could and would be used against him in a court of law, that he had the right to have an attorney and have him present with him while he was being questioned, and that if he

could not afford to hire an attorney, one would be appointed to represent him by the Court, and that at anytime he wanted to exercise these rights and not answer any questions or make any statements, he could do so.

Q. All right, did he make a statement?

A. At that time, Sheriff Compton asked him where the money was.

Q. Did he make a statement?

A. No, sir.

Q. Did he later make a statement?

(p.21) A. Yes, sir, he did.

Q. When was that statement made?

A. This statement was made when we returned to Wrens.

Q. He made no statement at all relating to this incident while you were at his residence in Augusta?

A. He made no statement there, no, sir.

Q. All right, was he questioned there in Augusta?

A. He was asked where the money was.

Q. Was he questioned by anyone while you were there?

A. Yes, sir.

Q. All right, was he reponsive to the questions that were asked of him?

A. Yes, sir.

Q. Were the statements he made freely and voluntarily made?

A. Yes, sir.

Q. Were they made without being induced by another?

A. Yes, sir.

Q. Were they made without the slightest hope of benefit or the remotest fear of injury?

A. Yes, sir.

Q. All right, I submit, if Your Honor please, that any statement he made was qualified under the Miranda requirements of constitutional law, as it was voluntary, and I submit that it would be admissible subject to cross examination of their admissibility by Mr. Pierce.

By The Court: Do you have any questions, Mr. Pierce?

By Mr. Pierce: No, sir, we will have no objection.

(p.22) By The Court: All right.

Q. Now, relate the conversations that were carried on at the trailer.

A. Sheriff Compton asked Moore where the money and the gun were, and Moore stated at that time that the money was in the floor register in the rear bedroom and the pistol was underneath the mattress in his bed.

Q. Let me go back and ask you one question. When Moore was advised you had a warrant against him for murder, was it related to him who the murdered person was?

A. Yes, sir, it was.

Q. And who was that?

A. Fredger Stapleton.

By Mr. Thompson: If it please the Court, I will ask the court reporter to mark these photographs as State's sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four and twenty-five.

Note: Photographs were identified.

Q. Now, I will ask you to look at each of these photographs and ask you to tell the Court what each one is and identify them by number, if you will.

A. State's sixteen is the register in the floor where the money was.

Q. All right.

A. Picture seventeen is the register after it was opened and the envelopes containing the money were removed.

By The Court: Are these the envelopes?

A. Yes, sir.

(p.23) Q. NOw (sic), what did these envelopes contain?

A. They contained the money.

Q. In twenty dollar bills?

A. Yes, sir.

Q. And how much money?

A. Fifty-seven hundred dollars.

Q. Fifty-seven hundred dollars.

A. Yes, sir.

Q. All right.

A. In photograph eighteen is the bed where the pistol was found, and photograph nineteen is a closeup view of the pistol, and picture number twenty is the single barrel shotgun that was removed from the culvert.

Q. All right, now wait a minute, and let's go with these photographs here and hold the others. Now, how did you know to go where the register is as shown in State's sixteen to open it and get the envelopes of money as shown in State's exhibit seventeen?

A. Moore told us where the money was hidden at, he showed us.

Q. All right, how did you know to go to the bed in State's exhibit eighteen to find the pistol that is shown there and as is enlarged in State's exhibit nineteen?

A. He advised us where the pistol was.

Q. All right, now what is the screwdriver?

A. It was under the bed when we turned it up and looked under there. It was probably used to open the register.

Q. All right, and State's exhibit twenty-one is what?

(p.24) A. That is the culvert where we recovered the shotgun. When we asked Moore where the shotgun was, he stated that he had disposed of the gun in a sewer near his residence, and he went with the officers to a culvert at the corner of Georgetown Drive and Highway One where agents recovered a single barrel, twelve gauge shotgun and four spent cartridge cases from the sewer.

Q. All right, is this the shotgun as shown in State's exhibit twenty?

Note: Shotgun exhibited.

A. Yes, sir, it is.

Q. And whose shotgun is this?

A. Fredger Stapleton's

Q. And how many times had it been fired?

A. It is a single barrel shotgun, and we found four spent cartridge shells.

Q. All right, and is that the gun identified in State's exhibit twenty?

A. Yes, sir, it is.

By Mr. Thompson: If it please the Court, I offer the shotgun at State's exhibit twenty-six.

Note: The shotgun was admitted without objection.

Q. All right, sir, and State's exhibit twenty-one, what is that?

A. That is a picture of the culvert that Moore took us to.

Q. The pistol is still at the Crime Lab?

A. Yes, sir, it is.

(p.25) Q. All right, now, this pistol as shown in State's exhibits eighteen and nineteen was identified by Defendant Moore as what?

A. As being his pistol.

Q. Was it identified by him or not as the pistol that he used to shoot and kill Fredger Stapleton?

A. Yes, sir, it was.

Q. Was the bullet recovered from the body of Fredger Stapleton taken to the Crime Lab?

A. Yes, sir, it was.

Q. And was the pistol sent to the Crime Lab?

A. Yes, it was.

Q. And what were the findings of the Crime Lab?

A. The Crime Lab report proved that the bullet found in the body of Fredger Stapleton was fired from the pistol that belonged to William Neal Moore.

By The Court: I see here in the Crime Lab report that microscopic examination and comparison of the evidence bullets against test bullets fired from the revolver reveals sufficient gross and microscopic similarities to conclude all four evidence bullets were fired

from the revolver. A similar examination of the cartridge cases indicates they were fired in the revolver.

Q. All right, now, let's proceed on to the other pictures which are State's exhibits twenty-two, twenty-three, twenty-four and twenty-five.

A. State's exhibit twenty-two is a picture of a nineteen seventy-three Chevrolet Nova that was parked in the drive at (p.26) Moore's residence and that was reported as being seen in Wrens at the time of the crime. Twenty-three is a picture of the same car showing the black stripe down the side of the car. Twenty-four is the same car. You can see a Fort Gordon sticker there on the bumper, and twenty-five is the same car, a front view.

Q. All right, all these pictures, twenty-two through twenty-five, are pictures of the car that was described to you by the four boys on the bicycles, a description of the car they saw parked there at the washerette in Wrens?

A. Yes, sir, it was the same car they described to us.

By Mr. Thompson: I now offer these pictures, twenty-two through twenty-five, in evidence, Your Honor.

Note: Ictures (sic) admitted with no objection.

Q. All right, what is this, Agent Cook?

A. This envelope contains the money and the envelopes that we removed from the register in William Neal Moore's residence.

Q. Who sealed that envelope?

A. Myself and Sheriff Compton.

Q. And how much money is in that envelope?

A. Fifty-seven hundred dollars.

Q. In cash money?

A. Yes, sir, in twenty dollar bills.

Q. Currency of the United States of America?

A. Yes, sir.

Q. And what is the value of that money?

(p.27) A. Fifty-seven hundred dollars.

Q. And the envelope is signed by you and Sheriff Compton and it shows fifty-seven hundred dollars?

A. Yes, sir.

Q. All right.

Note: Envelope exhibited to the Court and counsel for the Defendant.

Q. All right, now, the allegation in the indictment says fifty-seven hundred dollars in cash money and a single barrel shotgun, the fuit (sic) of the armed robbery, and a total value of fifty-seven hundred and thirty dollars, including the money and the single barrel shotgun, would that be an accurate statement?

A. Yes, sir, it would.

Q. Now, by what means were the fifty-seven hundred dollars and the single barrel shotgun taken from Fredger Stapleton?

A. It was taken through the use of a gun in an armed robbery.

Q. And that gun being . . .

A. The pistol that was found at Moore's residence.

By Mr. Thompson: Now, if Your Honor please, we have referred on several occasions to a report that was made by the Probation Officer, Mr. Clark Rachels, which included a Crime Lab report, I would like to submit the entire record as State's Exhibit Number twenty-seven that you now hold in your hand. Counsel for the Defendant has received a copy of the report so that it will be included in the record, which includes reports and letters that have been submitted by Counsel for the Defendant.

By Mr. Pierce: That is agreeable, Your Honor, and at the same (p.28) time, we would like for a copy of the warrants to go in also.

Note: Probations Officer's report admitted as State's Exhibit number twenty-seven.

Q. All right, now, did you find any tennis shoes at the residence of Moore?

A. Yes, sir, we found a pair of tennis shoes there also.

Q. And did you also send them to the Crime Lab?

A. Yes, sir, we did.

Q. And the report on them is also included in the Crime Lab report?

A. Yes, sir, it is.

Q. And that report is included in State's exhibit twenty-seven?

A. Yes, sir.

Q. All right, now when you left Augusta going back to Wrens, who had Moore in the car?

A. He was with Agent Hamilton and myself.

Q. All right, did you and Agent Hamilton have a conversation with him regarding this matter on the way back?

A. No, sir.

Q. You did not discuss this matter with him at all?

A. Not on the way back to Wrens, just general conversation with him then.

Q. All right, when you returned to Wrens, where did you go?

A. We went to City Hall.

Q. All right, sir, did you have a conversation with (p.29) the Defendant at that time?

A. Yes, sir, we did.

Q. And where was that?

A. We were in the lobby of the City Hall.

Q. And who was present?

A. Agent Hamilton and myself.

Q. On what date was this?

A. This was April the fourth, approximately two A.M.

Q. What statements did Moore make to you at that time?

A. He advised me that he left the White residence and went to the laundromat where he parked his car, and he went to Stapleton's house and went up on the porch and went in through the front, bedroom window, he went across the hallway into the living room and when he got into the living room, he told me that Stapleton came out of his bedroom with a shotgun, and he grabbed for the shotgun, and when he knocked the shotgun to the left, a shot fired from the shotgun and at that time, he pulled his gun out and fired, and then he said he got the money out of his pants pocket, he said the pants were under the pillow in his bed, and he went back into the living room and got the shotgun and left and went down the street to the laundromat where he had parked his car.

Q. Did he tell you what his intent wa s (sic) for going to the Stapleton home?

A. To rob him and get his money.

Q. Did he tell you how he knew it, how he knew Stapleton had a large amount of money?

(p.30) A. Agent Ingram was talking to him there and he said that Curtis told him that his uncle carried a large sum of money on him all the time, and he had been down to visit with Curtis and found out where Stapleton lived.

Q. Now, how had Moore learned that Fredger Stapleton had a large sum of money?

A. Curtis told him.

Q. And what relation is George Curtis to Stapleton?

A. Curtis is Stapleton's nephew.

Q. And what was the relation between Curtis and Moore?

A. Curtis and Moore had been in the hospital previously together, and apparently they became acquainted there in the hospital.

Q. All right, after Moore had made these statements to you, what did you do with Moore then?

A. We turned him over to Sheriff Compton.

Q. And he was brought to Louisville?

A. Yes, sir.

Q. And what did you do then?

A. I went home.

Q. All right, did you talk to Moore later about this.

A. No, sir.

Q. All right, then that concluded your investigation of the matter?

A. Yes, sir.

Q. And the statements that Moore made to you are in your report in State's exhibit number twenty-seven?

A. Yes, sir.

(p.31) Q. All right, the vehicle that is shown in State's exhibits twenty-two to twenty-five, as described to you as having been seen in Wrens on the night of April third, and that you saw at the residence of William Neal Moore in Augusta, did you discuss that vehicle with Moore as to who owned it?

A. Yes, sir, I did.

Q. And is that the vehicle that he told you that he went to the Stapleton home in?

A. Yes, sir.

By Mr. Thompson: Your witness, counsel.

CROSS EXAMINATION

BY MR. PIERCE:

Q. Mr.Cook, when you arrived at the scene, the body was still there, is that correct?

A. Yes, sir.

Q. Did you have occasion to see the body?

A. Yes, sir.

Q. Have you had occasion to see the autopsy report?

A. Yes, I have.

Q. Did you see anything in that autopsy report that said anything about any other type of wounds other than the bullet wounds?

A. No, sir.

Q. You indicated that the shotgun was discharged, it that correct?

A. Yes, sir.

(p.32) Q. Do you know anything else about that, other than what he told you?

A. The shotgun blast appeared to come from the bedroom into the living and hit a table in the middle of the living room, appeared to come from the bedroom in the direction of the hall, and from the investigation, Moore and Stapleton were in the middle of the living room, Stapleton was coming from the bedroom into the living room and the blast was into the living room.

Q. So the blast was away from the deceased?

A. Yes, sir.

Q. Towards the room?

A. Yes, sir.

Q. All right, sir, what do you know about George Curtis? Do you know him, didn't you say you talked to him?

A. AGent (sic) Ingram talked to Curtis.

Q. But you have seen him?

A. Yes, sir.

Q. Do you know about how old he is?

A. He appeared to be in his early twenties.

Q. All right, sir and you mentioned in your report no injury other than the bullet wounds, is that correct?

A. Yes, sir.

By Mr. Pierce: Thank you.

By Mr. Thompson: Does the Court have any questions?

By The Court: No, sir, I have none.

By Mr. Thompson: All right, you may come down.

By The Court: Call your next witness.

(p.33) By Mr. Thompson: Sheriff Compton.

WHEREUPON, SHERIFF ZOLLIE COMPTON, called as a witness in behalf of the State, being duly sworn, testified:

DIRECT EXAMINATION

Q. You are Zollie Compton, Sheriff of Jefferson County, Georgia?

A. Yes, sir.

Q. And Sheriff, you were acting in that capacity on or about April the third of this year?

A. Yes, sir.

Q. How did you receive word that Fredger Stapleton had been killed?

A. The police from Wrens called and advised me that he had been killed.

Q. And as a result of that, what did you do?

A. I proceeded to Wrens and Agent Herndon was called.

Q. And did Agent Herndon respond?

A. Yes, sir.

Q. And you heard the testimony of Agent Cook that he conducted the investigation, the primary responsibility was his, Senior Agent Herndon, Agent Monahan, Agent Ingram, Agent Hamilton also assisted in the investigation, is that correct?

A. Yes, sir, I was present and witnessed everything (p.34) except the last part where the Defendant confessed there in Wrens.

Q. All right, now as related to the testimony of Agent Cook, wherein you were present, do you confirm that which Agent Cook has testified about?

A. Yes, sir.

Q. All right, can you add anything to his testimony?

A. No, sir.

By Mr. Thompson: Your witness, counselor.

CROSS EXAMINATION

BY MR. PIERCE:

Q. Sheriff, do you know George Curtis?

A. Yes, I know him when I see him, I don't know anything about him.

Q. Do you kn ow (sic) where he is now?

A. No, sir, I don't

Q. Do you have any idea about how old a man he is?

A. He looked to be around in his twenties, twenty-five, somewhere around in there.

Q. Would you say that he's older than Moore?

A. I would think he's a little older.

By Mr. Pierce: No further questions.

By The Court: Anything further?

By Mr. Thompson: No, sir.

By The Court: Thank you, you can come down, call your next witness.

(p.35) WHEREUPON, G. B. I. AGENT R. F. INGRAM, called as a witness in behalf of the State, being duly sworn, testified:

DIRECT EXAMINATION

BY MR. THOMPSON:

Q. You are G. B. I. Agent R. F. Ingram?

A. Yes, sir.

Q. You assisted in the investigation into the death of Fredger Stapleton?

A. Yes, sir.

Q. In your own words, briefly, will you tell the Court what you did and your findings?

A. Yes, sir. As Agent Cook testified, Agent Monahan and myself arrived in Wrens, Georgia approximately five P.M. on April the third to assist Jefferson County and other GBI agents in the investigation into the death of Fredger Stapleton. Agent Monahan and myself began to canvass the neighborhood in an attempt to gain additional information into the circumstances surrounding the death. I went along the Old Stapleton Road interviewing people, and I interviewed Gordon Jenkins, who was an elderly black man, who discovered the body and he advised me that he had no knowledge other than the fact that he was to deliver a check to Stapleton that afternoon and that was why he came to be at the residence and discovered the body. And during my canvass of the neighborhood, I was at the junction of the old highway number seventeen and the Old Stapleton Road, I met a subject by the name of Willie James Wiley, a black male, (p.36) age twenty-nine, he approached me and said he had a little information, but didn't know if it would be of any value to the investigation, but he said he lived on the Old Stapleton Road and was coming home this night at approximately eleven thirty P. M. and while walking down the Old Stapleton Road, he noticed a person he described as a young, black male, which he further described as being between the ages of eighteen and twenty-five, medium heighth (sic), and medium build, and he stated that the subject was wearing brown pants, a light colored shirt, short sleeved without a collar, and wearing

tennis shoes, and he further stated that when he first noticed this man, he appeared to be carrying a walking cane, but when he got closer to him, he noticed that it was a single barrel shotgun, being carried in the position of a cane. He further stated that the black man had what appeared to be short to medium length hair and was a brown skin color. He further described the subject as being not a dark black, but rather a brown skinned type, what he described as a pecan color.

With this description, we than questioned him if he had observed any vehicles in the area, and he stated that at the laundromat at the junction of Georgia seventeen and the Old Stapleton Road, he noticed two vehicles at the parking lot at the laundromat, but noticed there was only one woman in the laundry and he thought it was rather unusual for two vehicles to be parked there and only one person, which he described as a young colored woman. One of the vehicles he descriged (sic) as a small, compact late model car which he thought was red in color. (p.37) This was the only description of the vehicle he could give us. He said he then proceeded up the Old Stapleton Road into the direction away from Georgia Highway seventeen, toward his residence, and he observed four, young black males riding bicycles, two people on each bicycle, one driving and one on the handle bars. He said that he didn't know what their names were, but he would get us their names and we could talk with them, and he gave us their names of Larry Wood, Sammy Douglas, Luman Terrell and Robert Mills. That's about all the information he could give us, but he did accompany us in our vehicle to help us locate these four boys. We

interviewed all four boys, and with the description of the vehicle which came from the four boys that was parked at the laundromat, which was described as a nineteen seventy-three, brown in color, Chevy Nova, with a black stripe down the side. They first stated that they saw one, black male entering the car with short hair, but could not give any further description of the man, and said the vehicle left in the direction of the Old Stapleton Road, entering Georgia seventeen, heading towards Wrens. NOw (sic), Wiley mentioned that he did not in any way see this man leaving the Stapleton residence, and Wiley said that when he was coming up the Old Stapleton Road, he observed the subject which I described, wearing the clothes that he described, coming off the front lawn of the Stapleton Residence and turning sharply, and after he got closer to him, he got a better view of him and he was able to give us a good description of him.

With this information, we continued the investigation, and a subject by the name of George Curtis was brought to the (p.38) Wrens police station. He was a black male and resided in Wrens, Georgia. Curtis stated that he on the previous night was at his girl friend's house, Doris White, with several other people, on a what he described as a get-together or having a little party, and they were drinking alcoholic beverages, beer, wine and liquor. Subject further stated in the interview that his uncle was the one who was killed and he did not know anything about it at all. He was then asked the names of the people there at the residence and to describe what kind of clothing they were wearing and what kind of vehicles they were driving. In

this interview, he described a nineteen seventy-three, orange Chevy Nova, with black racing stripes. He stated that the subject that was driving it that night was named William Neal Moore, who was a soldier at Fort Gordon. He further stated that Moore was about five, ten or eleven, of medium build, he had on a light colored shirt with no collar, brown pants and ten nis (sic) shoes that night. He met the description of the same subject seen by Wiley leaving the Stapleton residence that night. We further questioned Curtis and he stated that he and Moore were in the hospital together and had been fairly close and had numerous conversations, one of which was about the deceased, Fredger Stapleton. He said that Stapleton was his uncle, that he lived alone, and Moore asked him about the man, and through conversation, it was determined that Stapleton had large amounts of money on his possession, that he lived alone and that he lived in Wrens, Georgia. We continued the interview to determine if Curtis had any knowledge of the actual crime itself. We further (p.39) asked Curtis what time Moore left the residence that night, and he said it was approximately eight-thirty or nine o'clock. I then asked him if the vehicle that he was in was still in Wrens at eleven-thirty that night, if the subject had any business there, and he said, no, to his knowledge, the only one Moore knew was me, George Curtis, and he said that if the vehicle was there, that Moore must have been the one that was responsible for his uncle's death and that he would take us to Moore's residence in Augusta, Georgia to the trailer park, which he did do that morning, he did accompany us to the trailer park, at which time Sheriff

Compton and myself presented him with the warrant, identified ourselves, and we advised him who we were, and we advised him of the charges against him, and read the warrant to him and presented the warrant to him and gave him a chance to read it, and I advised him of his constitutional rights, subject stated to me that he was fully aware of his rights and understood them completely, and he further stated that he was a military policeman in the Army and he had advised people of their rights himself, he knew what the constitutional rights were. I further asked him if we could search the premises, he gave us his consent to search the premises. Sheriff Compton asked him where the money was and where the gun was, and he, Moore, told us exactly where they were. After that, Moore signed both a waiver to constitutional rights and a waiver to search his premises, and this concluded my part of the investigation.

By The Court: Do you have that waiver?

(p.40) A. The written waiver should be a part of the case report.

Q. Now, I hand you this waiver of counsel and ask you if William Neal Moore executed this on April the fourth, nineteen seventy-four, at twelve thirty A. M., and if you witnessed his signature?

A. Yes, sir, I witnessed that and Sheriff Zollie Compton also signed it.

Q. All right, I hand you the waiver of constitutional rights to a search warrant and ask you if William Neal Moore executed that?

A. Yes, sir, he did, approximately at the same time, witnessed by me and Sheriff Zollie Compton.the waiver form included the trailer as well as the automobile which is described as a nineteen seventy-three Chevy Nova with the tag number included.

By The Court: Assign that a number.

By Mr. Thompson: Yes, sir, the waiver of counsel is twenty-eight, and the waiver to a search warrant is twenty-nine. I tender these in evidence.

By Mr. Pierce: It's all right.

By The Court: All right, let them be admitted without objection.

By Mr. Thompson: Your witness, counselor.

(p.41) CROSS EXAMINATION

BY MR. PIERCE:

Q. Mr. Ingram. . . .

A. Yes, sir.

Q. When was it you said you interviewed George Curtis?

A. George Curtis was interviewed at nine-thirty A. M. on april the third, nineteen seventy-four, at the City Hall in Wrens, Georgia.

Q. And did I understand you to say that Curtis told you that he had been with William Moore the night this occurred earlier in the evening?

A. Yes, sir, on the previous night of his interview, which would have been April the second.

Q. I believe your testimony was that George Curtis stated that they had been drinking different beverages, is that correct?

A. Yes, sir, that's correct.

Q. What did you say they had been drinking?

A. I believe my testimony was that they were drinking alcoholic beverages.

Q. You don't know what?

A. Curtis described it as being beer, wine and some liquor.

Q. And when did he say he last saw Moore prior to the alleged crime?

A. He said that he last saw Moore approximately eight (p.42) thirty or nine P. M. on April the second.

Q. And they had been drinking?

A. Yes, sir.

By Mr. Pierce: Thank you.

By The Court: Anything further from Mr. Ingram?

By Mr. Thompson: No sir, you may come down.

If Your Honor please, this concludes the State's presentation of this phase of the proceeding, subject to the right of rebuttal.

By The Court: All right, sir, Mr. Pierce, do you have anything?

By Mr. Pierce: Your Honor, we don't have any witnesses other than the Defendant and members of his

family. You can just swear them and let them take the stand and let them tell you whatever they want to say, any way the Court wishes.

By The Court: All right, sir, call your first witness.

WHEREUPON, JAMES MOORE, called to the stand as a witness in behalf of the Defendant, being duly sworn, testified:

DIRECT EXAMINATION

BY MR. PIERCE:

Q. James, you are the brother of William Neal Moore, the Defendant, and this is your chance to tell the Judge anything you desire to tell him about your brother in mitigation in this case, you just tell the Judge whatever you want to tell him about it.

A. Well, sir, I know this is a terrible thing that happened. He was in the service and in the hospital with this (p.43) other guy, and I think it has some bearing . . . .

By Mr. Thompson: If Your Honor please, I can't hear him.

By The Court: Speak into that microphone if you will, please.

A. Well, as I was saying, I can't conceive of him doing something like this by himself. The moment I learned of this, I was shocked. He went in the service and was doing pretty good. There is not much I can say about it. He has never been in any kind of trouble,

other than just small scrapes as a child. That's all I can say.

By The Court: Just in a scrape as a child, but never anything violent?

A. That is correct, Yes, sir.

By The Court: You are an older brother, right?

A. Yes, sir.

By The Court: How many brothers and sisters does he have?

A. Well, there's five of us.

By The Court: Five? How many sisters and how many brothers?

A. Two sisters and two brothers.

By The Court: Is he the youngest?

A. He's the baby.

By The Court: The report shows that your father is stricken with arthritis and your mother has multiple sclerosis?

A. Yes, sir, she has multiple sclerosis.

By The Court: She apparently has suffered with that over a period of years?

A. Yes, sir, that's correct.

By The Court: Your father, the report shows, has been in the mental institution?

(p.44) A. Yes, sir.

By The Court: And I believe it said for the criminally insane, is that accurate or not?

A. Well, I understand that's right, but you know, it was probably just put on paper.

By The Court: It was just put on paper?

A. Yes, sir.

By The Court: Where is he now?

A. He's at home.

By The Court: He is at home with your mother?

A. Yes, sir.

By The Court: Yes, sir.

By The Court: And I believe the report shows that she is a beautician?

A. Well, she was, you know. My father wanted to come, but he couldn't.

By The Court: How old is your father?

A. Fifty-six, and of course, my mother couldn't come.

By The Court: She's in very bad health, is that right?

A. Yes, sir.

By The Court: All right, do you have anything else you want to say?

A. No, sir.

By The Court: All right, you can come down. Call your next witness, Mr. Pierce.

(p.45) WHEREUPON, TERRY MOORE, called to the stand as a witness in behalf of the Defendant, being duly sworn testified:

A. I'm Terry Moore, and I'm the second one. We were very distressed when we learned of this. We had it tough when we were young, and he got in the service; we didn't have no father when we grew up. We got a job after school and always tried to help out. I always tried to keep myself straight, and this is very, very serious, a crime like this. If there was any way we could turn this back, I wish we could turn it back. I know, I recognize that you want to see justice served, and every person makes a mistake in life. To take his life is not going to bring back another life.

By The Court: In other words, what you're saying is that to take his life is not going to bring back Fredger Stapleton?

A. Yes, sir, that is correct.

By The Court: How much older are you than your brother?

A. I'm two years older.

By The Court: You are the closest to him in age than any of the other brothers and sisters?

A. Right.

By The Court: Any other questions, Mr. Pierce?

By Mr. Pierce: No, sir.

By The Court: Mr. Thompson, do you have any questions?

By Mr. Thompson: No, sir.

By The Court: Thank you, sir.

(p.46) HEREUPON, MRS. REGINA WALKER, called as a witness in behalf of the Defendant, being duly sworn, testified:

A. My name is Regina Walker, and I'm next to the oldest sister of Billy. My sister and I, we helped raise him, and he was always a pretty good boy, he hasn't been in any kind of trouble or anything, and he was in the service and had an operation on his knee, which was real serious, and then he had a lot of domestic problems with his wife, we had been keeping the baby. At the time this happened, he had only been back about three weeks, he had to come home to get the car and the baby. I'm not saying he's justified, but he had a lot of problems, and at the time this happened, he had been drinking, and I don't really think he would have done anything like this, because, you know, he wasn't raised like that, I just don't understand.

By The Court: You stated you were the oldest?

A. I'm next to the oldest.

By The Court: Any questions?

By Mr. Pierce: No, sir.

By The Court: Mr. Thompson?

By Mr. Thompson: No, sir.

By The Court: Thank you, mama (sic).

WHEREUPON, MRS. NORMA JEAN WHIPPLE, called to the stand as a witness in behalf of the Defendant, being duly sworn, testified:

A. I'm Norma Jean Whipple, I'm the oldest of five children. I helped rear him when he was a child, sent him to (p.47) school, he was a good student in school, he made good grades, received recommendations for achievement in school and certificates. Right before he left school to go to the service, he was working at Jeffery's Manufacturing Company, and he got in the service, he went to school and got recommendations in the service, and he got married while he was in the service, and he was recommended for a specialist school. He finished his time in Germany and he went to Fort Gordon, and because he was recommended to attend this special school, he was going there in June. My mother told me to tell you he's a good boy, and it's just hard for her to understand what happened, or what made him do something like this, because he's not basically unstable.

By The Court: Any questions, Mr. Thompson?

By Mr. Thompson: No, sir.

By The Court: Is there anything else you would like to say?

A. I probably will think of a million things when I sit down. Thank you very much.

By The Court: Thank you.

By Mr. Pierce: Your Honor, I would like to call the Defendant to the stand.

By The Court: do you want him sworn or not?

By Mr. Pierce: Swear him, Your Honor.

WHEREUPON, THE DEFENDANT, WILLIAM NEAL MOORE, taking the stand in his own behalf, being duly sworn, testified:

By The Court: Of course, you understand you are not required to make a statement, you may remain silent.

(p.48) A. Yes, sir.

By Mr. Pierce: Billy, I want you to try as best you can to tell the Judge how you got mixed up and how you came about doing this thing and how you feel about it.

A. I'm sorry I killed, it was stupid. I didn't mean to kill him. I was in the hospital and met George Curtis when I was in the hospital, and he was there too, and I talked to him, and he told me about his uncle.

By The Court: Just a minute, let me turn this thing off so we can hear you.

A. He told me about his uncle, had this money, and he told me where his uncle lived at, and he showed me where his uncle lived at. We planned this, he wanted to burn his uncle up, he would get the money and burn him up in the house, and we went over there and Curtis got scared after he went into the house, that was the first time, we was drinking, we had been drunk, we went over to this girl's house. I don't know

her name, he took me over there, and we went over to the house, we went to the back door, and we got in between one of the bedrooms and the front room, there was a locked door, we left and went back over to Curtis' house. Curtis, he left and I went back over there. I didn't have no intention of killing him. When I went in there, he come out there with a shotgun and hit me in the leg, it scared me, made me shoot him, and I'm sorry for what I did, and ask for mercy of the Court.

By Mr. Pierce: You Honor, I have no further questions.

By The Court: All right, Mr Thompson?

(p.49) CROSS EXAMINATION

By Mr. Thompson:

Q. You have seen the envelope here that the officers said contained fifty-seven hundred dollars, and they state that this is the money that you gave them that came out of the vent, and that you said it's the fruit of this robbery that you got this fifty-seven hundred dollars from Fredger Stapleton, is that correct?

A. That's correct.

Q. And is this fifty-seven hundred dollars the property of Fredger Stapleton?

A. It is.

Q. And do you claim any title, interest or any right in any of this money?

A. No, sir.

Q. And this is the money and it now belongs to the estate of Fredger Stapleton, is that correct?

A. That's correct.

By Mr. Thompson: No further questions, Your Honor.

By The Court: All right, sir.

By Mr. Pierce: You can come down.

By The Court: Thank you. Do you have anything further, Mr. Pierce?

By Mr. Pierce: No, sir, nothing further, Your Honor.

By Mr. Thompson: I don't have anything in rebuttal, Your Honor.

By The Court: All right, we will recess for lunch and return at two o'clock and will hear the arguments of counsel.

(p.50) WHEREUPON, COUNSEL for the State, Hon. H. R. Thompson, presents his case to the Court, with Counsel for the Defendant making the closing argument.

AND AFTER HEARING ARGUMENTS, the Court recessed until three-thirty P.M. at which time the Court rendered its opinion.

By The Court: All right, is there anything you have to say, William Neal Moore, before sentence is imposed?

By The Defendant: No, sir.

By The Court: All right, now everyone remain silent, I don't want any outbursts.

The State of Georgia versus William Neal Moore, in the Superior Court of Jefferson County, Georgia, Indictment Number three, May Term nineteen seventy-four, charges: murder and armed robbery, Findings of the Court: based on the Defendant's plea of guilty and the evidence presented to this Court, the Defendant having waived a Jury trial on the question of punishment for the capital offenses charged, I find the Defendant guilty of the offense of armed robbery as charged against him in Count two of the indictment. On the question of punishment, prior to the imposition of the death penalty, one statutory aggravating circumstance is found by the Court to exist, to wit: the murder of Fredger Stapleton was committed while the accused, William Neal Moore, was engaged in the commission of another capital felony, that is, armed robbery of the said Fredger Stapleton. Also, I find that the armed robbery of Fredger Stapleton was committed while the accused, William Neal Moore, was engaged in the commission of another capital (p.51) felony, that is murder of the said Fredger Stapleton.

CODE SECTION twenty-six dash nineteen aught two defines armed robbery as follows: A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. Therefore, I find that William Neal Moore did on the second day of April nineteen seventy-four, with intent to commit theft, take fifty-seven hundred dollars

in cash money and a shotgun from the immediate presence of Fredger Stapleton by use of an offensive weapon, to wit, a thirty-eight special revolver, the said money and shotgun being the property of Fredger Stapleton.

CODE SECTION twenty-six dash eleven aught one defines murder as follows: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Therefor, I find that William Neal Moore did, on the second day of April nineteen seventy-four, unlawfully and with malice aforethought, kill on Fredger Stapleton, a human being, by shooting the said Fredger Stapleton with a thirty-eight special revolver.

I FURTHER find that Georgia law defines armed robbery and murder as capital felonies.

Comments By The Court: The death penalty statute of Georgia, Code section twenty-seven, twenty-five thirty-four point one, requiring proof of aggravating circumstances to justify the imposition of the death penalty was enacted by (p.52) the General Assembly of Georgia, signed into law by the Governor of Georgia, and held to be constitutional by the Supreme Court of Georgia in Coley versus the State, two thirty-one Georgia, eight twenty-nine. It is therefore the function of this Court to apply this statute to the facts of this case in determining the punishment to be imposed. This I have done. Since discretionary sentencing is sanctioned by Georgia Law, the application of quote evenhanded justice, and quote, mentioned in Coley supra, and the Supreme Court of the United States decisions Furman

versus Georgia and Jackson versus Georgia, ninety-two Supreme Court, twenty-seven twenty-six, is a matter that addressed itself to the Supreme Court of Georgia.

I AM AWARE of the conflict of opinions by various other state jurisdictions, and the conflict of opinion of the Justices of the Supreme Court of the United States over the question of mandatory and discretionary sentencing in capital cases. However, I reiterate that I am bound by the decision of the Supreme Court of Georgia.

THESE FINDINGS made in Open Court at the Jefferson County, Georgia courthouse in Louisville, Georgia this the seventeenth day of July nineteen seventy-four, Walter C. McMillan, Jr., Judge, Superior Courts of the Middle Judicial Circuit and filed in office this July seventeenth, nineteen seventy-four, E.J. Smith, Clerk.

(p.53) NOW, IN STATE OF GEORGIA VERSUS WILLIAM NEAL MOORE, in the Superior Court of Jefferson County, Georgia Indictment number three, May Term nineteen seventy-four, charges, count one, murder, count two, armed robbery, ORDER OF THE COURT; The Defendant having plead guilty to this Court, and the following aggravating circumstances having been determined by the Court, to wit, the murder of Fredger Stapleton was committed while the accused, William Neal Moore, was engaged in the commission of another capital felony, that is, armed robbery of the said Fredger Stapleton, Therefore, it is considered, ordered and adjudged by the Court that the Defendant, William Neal Moore, be taken from the Bar of this Court to the common jail of Jefferson County or

to some other safe and secure place under such guard and protection as may be deemed necessary, where he shall be safely and securely kept until his removal therefrom to the custody of the Director of the State Department of Corrections, for the purpose of the execution of this sentence in the manner prescribed by law.

IT IS FURTHER ordered and adjudged by the Court that on the thirteenth day of September nineteen seventy-four, the defendant, William Neal Moore, shall be executed by the Director of the State Department of Corrections at such penal institution as may be designated by said Director, and witnessed only by the executing officer, Defendant's relatives, (p.54) counsel and such clergyment (sic) and friends as he may desire.

IT IS FURTHER ordered that the Sheriff of Jefferson County, Georgia together with such deputies as he may deem necessary, the number of guards to be approved by the presiding Judge or the Ordinary of said County, shall convey and deliver the said William Neal Moore to the Director of the State Department of Corrections at such penal institution as may be designated by said Director not more than twenty days and not less than two days prior to the time fixed herein for the execution of said condemned person, and there delivered into the custody of said Director.

And It Is Further Ordered that the said Defendant, William Neal Moore on the day fixed herein between the hours of ten o'clock AM and two o'clock PM be by the Director of the Said Department of Corrections electrocuted at the time and place and in the manner

herein provided by Law. And may God have mercy upon his soul.

Signed This Seventeenth day of July nineteen seventy-four, Walter C. McMillan, Jr., Judge, Superior Court, Jefferson County, Georgia, and filed in office this seventeenth day of July nineteen seventy-four, E.J. Smith, Clerk.

I Have This comment to make, Mr. Moore. You, in my opinion, did everything that a man could do after you were caught and do an honorable thing insofar as your true statements made, your cooperation with the officials, pleading guilty to the mercy of the court, and placing an awsome (p.55) responsibility on me. I could, if words were at my command, try to express to you the way that I have felt about this thing all along. I had not welcomed the decision that I had to make. I feel like that capital punishment is not an unjust punishment in many instances, and I don't feel like it's unjust in this one. I have many, many reservations about whether there will be an execution by Government authorities in this county ever again. As I stated in here, you might not have understood it, but the Supreme Court of Maryland has said that this decision of Furman versus Georgia and Jackson versus Georgia applies a different standard, that is, that the law be mandatory. If a person commits murder and armed robbery, the law must say that he must die. It must not be any discretion left on the part of the judge or jury. That seems to be the conflict. Georgia has said that discretionary sentencing is appropriate.

THE LAW PROVIDES, however, that in all death cases, the case is automatically appealed to the Supreme Court of Georgia, and of course, this case will be. And the record will be typed up by the court reporter and filed in office with the Clerk and sent to the Supreme Court of Georgia. Then they will take cases that have taken place in Georgia over a period of years and they will apply the facts to this case to the facts of other cases that have happened in Georgia, and then they will apply (p.56) "evenhanded justice" to your case with other similar cases that have happened in Georgia. Now, I can't make that determination. The law does not place that discretion in me. It places that discretion solely within the jurisdiction of the Supreme Court of Georgia. As to whether or not that actually applies in your case is for them to decide. So, of course it will be necessary for you to stay under the custody and jurisdiction of the Sheriff until this appeal is pursued in the Supreme Court of Georgia. If they affirm it, very likely to the Supreme Court of the United States.

SO, I FOUND aggravating circumstances. I also found, but I didn't need to find, for purposes of this finding, mitigating circumstances insofar as the aggravating circumstances were concerned. Mitigating means good circumstances, those being your willingness and your forthrightness in meeting what must be to you a terrible, terrible experience. So that does go to your credit, but for the purposes of this Court, for this finding, I could not in good conscience apply in your case sufficient to wipe out the aggravating statutory circumstances. We've got this. If we're going to philosophy about it, and if I'm permitted to do that, I'll do it.

People in their homes - the most precious place a man can have - is his home; and to be in a home, and probably this man was asleep, I don't know, or for any person to be, not this man, but any (p.57) person, to be asleep in his home to be invaded by an intruder, that's armed with weapons, that's prepared necessarily to kill (or otherwise the weapon wouldn't be there in the hands of the intruder), is probably an invasion of the highest injustice that another can do. Now, I can only imagine that anyone that is invaded by an intruder with an armed weapon, the fear that they must go through when they are encountered in such a situation. So, I feel like that if the Court ever does require mandatory punishment - that is when they specify by law what offenses will have to be suffered by the electric chair - that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

NOW, YOU WILL BE CARRIED to the penitentiary. It's a violation of the law to escape or attempt to escape from the penitentiary. The law further is that you can receive five additional years for the offense of escape, and the guards have orders to shoot and shoot to kill if necessary to prevent an escape, and they would be justified in killing you if you did attempt to run. In addition to that, you could get five additional years in the penitentiary. You say, well, what difference (p.58) does it make, I've been sent to the electric chair. You do have the hope that the Supreme Court will

reduce this to life imprisonment, and there is the hope that the Supreme Court of the United States will void all electrocution cases, but it is not for me to say.

THAT'S THE JUDGMENT of the Court, and good luck to you. So that concludes the case.

THERE BEING NOTHING FURTHER, THE CASE OF THE STATE OF GEORGIA VERSUS WILLIAM NEAL MOORE WAS CONCLUDED.

Illegible
of the
Superior Court of JEFFERSON County, Georgia

The State vs. William Neal Moore
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name Moore William Neal
   Last, First Middle

2. Date of Birth 5 - 14 - 51
   Mo. Day Year

3. Social Security Number 275-24-2426

4. Sex: M [X]
   F [ ]

5. Marital Status: Never married [ ]
   Married [X]
   Divorced [ ]
   Spouse Deceased [ ]

Children
(a) Number of children One
(b) Ages of children:
1 2 *3** 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

Father living: Yes [X] No [ ]

If deceased, give date of death _____
Mother living: Yes [X] No [ ]
If deceased, give date of death _____

Number of children born to parents five

Education–Highest Grade Completed:
1 2 3 4 5 6 7 8 9 10 11 *12** 13 14 15 16
(Circle one) [college]

---

*Italics circled in copy.

Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ]
(IQ above 100) High [ ]
UNKNOWN

Psychiatric Evaluation Performed? Yes [ ] No [X]
If performed is defendant:
a. Able to distinguish right from wrong? [ ] [ ]
b. Able to adhere to the right? [ ] [ ]
c. Able to cooperate intelligently in his own defense [ ] [ ]
If examined, were character or behavior disorders found? [ ] [ ]
(If answer is yes please elaborate)_____
N/A

What other pertinent psychiatric [and psychological] information was reve
N/A

Prior Work Record of Defendant:

Type Job	Pay	Dates Held	Reason for Termination
a. See Probation Officer's Report, Page 4			
b.			
c.			
d.			
e.			

*A separate report must be submitted for each defendant sentenced to death.

Illegible

How did the defendant plead? Guilty [X] Not guilty [ ]

C. Offense related data

1. Capital Offense for Which Penalty Imposed:
   a. Treason .....[ ]
   b. Murder .....[X]
   c. Kidnapping for Ransom.....[ ]
   d. Kidnapping where Injury Results .....[ ]
   e. Aircraft Hijacking .....[ ]
   f. Rape.....[ ]
   g. Armed Robbery .....[X]

2. Were other offenses tried in the same trial?
   yes [ ] no [X]

   If other offenses were tried in the same trial list those offenses.

   a. N/A
   b. _____
   c. _____
   d. _____

3. If tried with jury, did the jury recommend the death sentence? Yes [ ] No [ ]

4. Statutory aggravating circumstances found:
   Yes [X] No [ ]

5. Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	[ ]	[ ]

	(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b.	(1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery or	[ ]	[X]
	(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[ ]
c.	The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]
d.	The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[X]

e.	The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g.	The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[ ]	[ ]
h.	The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i.	The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]

j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another. [ ] [ ]

List non statutory aggravating circumstances indicated by the evidence, if any.

a. The crime had been planned well in advance of the time committed; and,
b. on another occasion the defendant had entered the house of the decreased
c. and was not completed. The defendant returned again on the date that
d. the robbery and murder occurred. In other words, this crime had been
planned for sometime prior to its execution.

Was there evidence of mitigating circumstances?
Yes [X] No [ ]

If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity. [ ]
(None, except Juvenile record)

b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [ ]

c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [ ]

d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. [ ]

e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. [ ]

f. The defendant acted under duress or illegible of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [X]

i. Other [X]
please explain if (i) is checked His forthrightness in admitting the crime upon his apprehension.

If tried with a jury, was the jury instructed to consider the circumstances indicated in *8* as mitigating circumstances? Yes [ ] No [ ]

Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [X]

Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [X] No [ ]

Was the victim related by blood or marriage to defendant? Yes [ ] No [X]

If answer is yes, what was the relationship?_____

_____

_____

Was the victim an employer or employee of defendant?
No [X]
Employer [ ]
Employee [ ]

Was the victim acquainted with the defendant? No [X]
Casual Acquaintance [ ]
Friend [ ]

Was the victim local resident or transient in the community?
Resident [ ]
Transient [X]

Was the victim the same race as defendant?
Yes [X] No [ ]

Was the victim the same sex as defendant?
Yes [X] No [ ]

Was the victim held hostage during the crime? No [X]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

Was the victim's reputation in the community:
Good [X]
Bad [ ]
Unknown [ ]

Was the victim physically harmed or tortured?
Yes [X] No [ ]

If yes, state extent of harm or torture:_____
No torture except he was shot several times.
_____

Illegible weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]

Blunt Instrument	[ ]
Sharp Instrument	[ ]
Firearm	[X]
Other _____	

_____

4. Does the defendant have a record of prior convictions? Yes [X] No [ ]

5. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed:

Offense	Date of Offense	Sentence Imposed
a. Tampering with Vending Machine	8-31-68	unknown
b. Curfew violation during riot	7-22-69	unknown
c. Juvenile violations - see Probation Officer's report, page 3		
d. _____		

6. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [X]

7. Was the defendant a local resident or transient in the community?
Resident [ ]
Transient [X]

D. Representation of Defendant*

1. Date counsel secured Prior to arraignment on June 4, 1974.

2. How was counsel secured?
   a. Retained by defendant [X]
   b. Appointed by Court [ ]

3. If counsel was appointed by court was it because
   a. Defendant unable to afford counsel? [ ]
   b. Defendant refused to secure counsel? [ ]
   c. Other (explain)_____ [ ]
   _____
   _____

4. How many years has counsel practiced law?
   a. 0 to 5 [ ]
   Unknown to Court [ ]
   b. 5 to 10 [ ]
   c. over 10 [ ]

5. What is the nature of counsel's practice?
   a. Mostly civil [ ]
   b. General [ ]
   c. Mostly criminal [ ]

6. Did the same counsel serve throughout the trial? Yes [X] No [ ]

7. If not explain in detail._____

* (If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [ ]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [ ]

3. What percentage of the population of your county is the same race as the defendant?
   a. Under 10% ..... [ ]
   b. 10 to 25% ..... [ ]
   c. 25 to 50% ..... [X]
   Approx.
   d. 50 to 75% ..... [ ]
   e. 75 to 90% ..... [ ]
   f. over 90% ..... [ ]

4. Were members of defendant's race represented on the jury? Yes [ ] No [ ] N/A

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [ ] N/A

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [ ] N/A

7. Was there extensive publicity in the community concerning this case? The crime was known generally in the community.(?) Yes [ ] No [ ]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [ ] N/A

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ] N/A

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ] N/A

11. If answer is yes, what was that evidence?_____

12. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case _____
I assume that this question was intended for cases in which the jury imposed the death penalty.

F. Chronology of Case

	Elapsed Days
1. Date of Offense April 2, 1974	
2. Date of Arrest April 4, 1974.	2 days
3. Date Trial Began July 17, 1974.	75 days
4. Date Sentence Imposed July 17, 1974.	75 days

Post trial motions ruled on N/A

*Date Trial Judge's Report Completed Aug. 28, 1974

*Date Received by Supreme Court_____

*Date Sentence Review Completed_____

*Total Elapsed Days_____

* To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

SEE ATTACHED LETTER

1. His comments are attached ( )
2. He stated he had no comments ( )
3. He has not responded ( )

Date
Aug. 28, 1974

/s/ Walter C. McMillan, Jr.
Judge, Superior Court of
Jefferson County

PRE-SENTENCE INVESTIGATION
JEFFERSON COUNTY

CASE STUDY

DEPARTMENT OF OFFENDER REHABILITATION
COMMUNITY-BASED SERVICES

Institution Number ___ Court Number ___

Name: WILLIAM NEAL MOORE
Alias: "BILLY"

Address: Crystal Springs Trailer Park, Augusta, Ga.

County	State	Race	Sex	Age
Richmond	Georgia	B	M	23

Ht.	Wt.	Birthdate
5'11"	153	5/14/51 (Columbus, Ohio)

Offense
Count 1: Murder; Count #2; Armed Robbery

Date Arrested	Time in jail	District Attorney	Bond
4/4/74		H.R. Thompson	

Arresting Officer
Jeff. Co. Sheriff's Dept. and D.O.I. Agents

Defense Attorney	Judge
Hinton R. Pierce	Walter C. McMillan, Jr.

Court	Report date
Superior	7/17/74

PRESENT OFFENSE:

Indictment #2313 states that on the second day of April in the year of our Lord nineteen hundred and seventy-four in the county aforesaid, did then and there unlawfully and with malice aforethought kill one Fredger Stapleton, a human being, by shooting the said Fredger Stapleton with a certain pistol, contrary to the

laws of the State of Georgia, the good order, peace and dignity thereof.

County #2: And the Grand Jurors aforesaid, on their oaths aforesaid, in the name and behalf of the citizens of Georgia further charge and accuse William Neal Moore with the offense of Armed Robbery for that the said William Neal Moore on the 2nd day of April, in the year of our Lord nineteen hundred and seventy-four in the county aforesaid, did then and there, unlawfully with intent to commit theft, took from the person of Fredger Stapleton, the following property, to wit-: $5,700.00 in cash money and one single barrel shotgun, of the property of Fredger Stapleton, of the total value of $5,730.00.

Counts #1 and #2 occuring simultaneously.

On June 24, 1974, William Neal Moore, represented by Attorney Hinton R. Pierce, advised said Mr. Pierce to enter him a plea of guilty before the presiding Judge, Honorable Walter C. McMillan, Jr., Superior Courts, Middle Judicial Circuit, to the offenses of murder and armed robbery. Sentence at this time was delayed by Judge McMillan who requested a pre-sentence investigation to be completed by the Probation and Parole Supervisor by July 17, 1974 at which time sentence would be imposed.

Personal contact was made with the Jefferson County Sheriff's Department, Sheriff Zollie Compton, who stated that the Sheriff's Department received a call that there had been a murder in Wrens, Georgia at the Fredger Stapleton residence. Benny Mills, neighbor of Mrs. Jenkins who is sister to the dead man, notified

the Sheriff's Department of the murder. The City Police of Wrens arrived first at the scene and then the Sheriff's Department arrived.

The Georgia Bureau of Investigation was then immediately notified and they came to the scene to investigate the murder. They took fingerprints, pictures of the dead man's body and started their investigation by contacting people in the neighborhood. Agents of the Thomson GBI of the DOI who aided in this investigation were Agent C. W. Herndon, Agent H. E. Cook, Agent M. B. Monahan, Agent Steve Hamilton and Agent R. F. Ingram. (Their statements can be found in the enclosed report, along with the Coroner's report (Dr. J. L. Veatch), Medical Examiner's (Dr. George Pilcher) report, and crime lab report (Dr. Larry Howard).)

Sheriff Compton stated that "Informer A" gave him a good lead as to who might have committed the crime. This subject's car was parked at a laundermat near the Stapleton home the night the offense occurred. "Informer B" stated that he saw someone walking up the street near Stapleton's house who fitted the description of William Neal Moore, said someone was carrying a shotgun in his hand. Mrs. Mattie Bell Jenkins, sister of the deceased man, took out a warrant for Moore for Murder and Armed Robbery, his address being 2513 Repace Drive, Crytal Springs Trailer Park, Augusta, Georgia. The Sheriff's Department and GBI agents went over to this address and told Moore they had a warrant for his arrest, advised him of his rights, searched him, made him strip to see if he had bullet wounds on him, due to the fact the dead man's gun had been fired, and then brought Moore back to Wrens,

Georgia where he made a full confession. Moore was placed in Jefferson County Jail 4/4/74 without bond.

On July 24, 1974, the family of the deceased, Fredger Stapleton, were contacted. His sister, Mrs. Mattie Bell Jenkins, age 75, stated that she was very close to her brother, that he lived alone and did all his own cooking and cleaning of his home that was necessary, that he usually walked to her house once or twice a week and that usually on Sundays she would cook his meal and carry it to him. She states that he usually sat in his backyard days permitting, whittling, and sometimes dozing in the sun. She also states that to her knowledge, he had no enemies and she could not understand why this young man took her brother's life for the amount of money that he did, that he could have tied him up and took the money without killing him. She further states that she feels that he should be punished to the fullest extent of the law, that she expressed feelings for the death sentence in this case. She stated that her brother was at home asleep when the young man came and disturbed him and took his life.

Alma Stapleton Harper, daughter of the deceased and an employee of Teachers Retirement System in New York, expresses wishes for the life sentence without parole. She states that he had been a strict father but a good father, and that she was the "apple of his eye". She also stated that she kept in constant contact with her father by mail and that he especially loved small children.

Joseph D. Harper, son-in-law of the deceased and an employee (motorman) for New York City Transient

Authorities for 13 years, stated that there was no punishment good enough for William Neal Moore for the crime that he committed. He further states that he was treated by his father-in-law like a son, that they would sit and talk and that they had an overall close relationship.

Olden Stapleton, brother of the deceased and a retired employee of General Motors, 28 years services, living in Lindon, New Jersey, stated that the severest punishment that this man could get is still not enough. He states that his brother was a cigar fiend, that he loved children, and that he lived with his mother until she died 1 1/2 years ago at the age of 93. He further states that his mother left him three $100 bills in an inheritance and that they could not be found and that he is sure his brother did not cash them in. He also stated that they had a close relationship, that he lived with his brother for some time while they were up-state and that he remembers when both of his brother's children were born. He stated that his brother was a really "nice guy".

Personal contact was made with William Neal Moore, Jefferson County Jail. During this interview, Moore seemed alert, aware of the circumstances of this case and answered all questions readily. He states that he was in a hospital in Ft. Gordon and he met this fellow, George Curtis, from Wrens, Georgia, that had wounds received from Service. At this time, Moore was in the hospital for a leg operation. He states that George Curtis told him about his uncle, Fredger Stapleton, who carried a lot of cash on him. He states that they were planning to rob him together but every time,

Curtis got drunk, so on the night of 4-2-74, around 12:00 midnight, he went over to the old man's house. (States that he and Curtis went out drinking and he left Curtis at his house drunk, parked his car at a laundermat) Moore states he entered the house through a window and went through rooms until he came to the old man's bedroom. He knocked on the door and Stapleton asked who is it. Moore states he opened the door, and while he was standing by the door the shotgun bumped him on the leg. He shot the man four times and during this time, the shotgun went off. The shotgun belonged to Stapleton. Stapleton fell back on the floor. Moore took the gun from the floor, went over to the man, found his pants containing two billfolds, containing $5400.00 all in $20 bills. He went back to his car, drove to Augusta to his trailer at 2506 Repot Drive and picked up his son which he had left with friends to babysit. He put the shotgun in a manhole at the Quickie Mart near the trailer park where he lived, put the money in envelopes and left it in the air ducts of the trailer, and put the guns under the mattress of the bed. He got up the next day and went to work. At approximately 12:30 a.m. GBI agents came to the door stating they had a warrant for his arrest for murder. He told them where the money and the pistol was, they got them. Moore states that GBI agents snatched him out of the door, frisked him, then made him go inside and strip to see if he had any gunshot wounds, put handcuffs on him. Daniel Berry and his girlfriend came and got the child. The child's mother came down and picked the child up the next day. Moore made a full

confession to the crime the same night he was picked up for the crime that he committed in Wrens, Georgia.

RECORD OF PREVIOUS OFFENSES:

(Juvenile)

3-8-62	Larceny of cars
4-4-62	Mollesting
12-6-63	Malicious neglect of property
9-9-64	Unarmed robbery
10-1-65	Petty larceny and intoxication
11-9-65	Incorrigible and curfew violation
7-1-66	Petty Larceny
6-22-67	Breaking and entering
8-31-68	Tampering with vending machines

(Adult)

7-22-69	Curfew violation during riot.

No further records could be found in State or Superior Court records of Jefferson County, Georgia. All of the above are from Ohio.

PERSONAL HISTORY:

Parents: Father is General James Moore, age 56 DOB 4/9/18, disabled for 15 years due to being in a mental institution but he is presently working. They lived off social security at the time of father being institutionalized. Moore's mother has multiple sclerosis but is a beautician. Her name is Margaret Willmean Jackson Moore, age 56, DOB 7/19/19. Subject has two brothers and two sisters: Norma Jean Gripper, age 34-1771 Rainbow Park, Columbus, Ohio; Regina

Walker, age 32, 1851 Newberry Street, Columbus, Ohio; James Douglas Moore, Jr., age 27, 721 Kembrill Place, Columbus, Ohio; and Terry Duran Moore, age 24, 1079 Omstead Apt. A, Columbus, Ohio. Moore also stated that his sisters and brothers would be here for his trial.

Religion: Catholic, Holy Cross Church; Father of Church unknown and attendance is irregular. Moore states that his religion came from his parents background. His father attends regularly. His mother is in a wheelchair from multiple sclerosis. Subject states that his mother read the Bible to him but he was undecided as to religion. When he was young, he attended regularly, but didn't take part in church activities.

Education: Fulton Street School (1, 2, 3 grades) 1956-60; Kent Street Elementary School (4, 5, 6 grades) 1960-63; Roosevelt Junior High (7, 8, 9 grades) 1963-66); South High School (10, 11) 1966-1968; Frankford High, Frankford, Germany, 12th grade 1:00 to 5:00 p.m. Moore states he failed the 3rd grade because his mother switched from public school to Catholic School (Holy Cross) and then back to Fulton School. He quit South High School to join the army. In the ninth grade he received an outstanding award for Art. History was his best subject and Englist was his poorest. When subject was placed on juvenile probation, his 8th grade teacher was also his Probation Officer, Mr. Scott. Moore states he took a correspondence course in Electronics and Technology with Laboratory. He had money problems but he finished except for two lessons in Cleveland, Ohio. He took a military correspondence course 95C-Correctional Confinement Specialist.

EMPLOYMENT:

1963-66	After School in Roosevelt Junior High, Ohio Youth Commission-obtained job for three years at $1.15 hr.
1967	Lowe & Dick Construction Company, 3 months in summer time $2.85/hr.
1968	Partnership with Robert Edwards and Robert Parker in painting company, 2 months: did paint trimming on house or inside.
1968-1969	Jeffery Manufactors-operated scoop loader for steel manufacturing for $3.87/hr. His reasons for leving was to join Army-Union Member.

Enlisted in Army on October 13, 1969

Basic:	Fort Know (sic), Kentucky, 2 months Fort Lenningwood, Missouri, 2 months Fort Benning, Georgia, 3 weeks Fort Dixie, New Jersey-transferred to Germany Frankfurt, Germany-30 months-June 12, 1973. First two months he worked as a Turn Key and for 16 months he was mail clerk. 709th M. P. Battalion, Mail Clerk and Manager of PX. During this time, he received a letter of achievement for working in the mail room, for his outstanding duties as a mail clerk.

Relisted (sic) on February 28, 1973, while in Germany. He is stationed now at Ft. Gordon, Georgia and has been since July 13, 1973.

HEALTH:

He was in good shape, physically, until while playing Unit football on post he tore his right knee up and

it had to reconstructed. He was hospitalized for 6 months at Fort Gordon. He has no psychiatric history but has an emotional fear of snakes.

MILITARY HISTORY:

Enlisted on October 13, 1969 and is presently still enlisted. He has served three years eight months with his highest rank being E4. His classification # is 275-48-2426. His commanding Officer is Captain Hatfield, Co. C, 2nd Batallion, Sch. Bde., USASESS (Southeastern Signal School) Extention 4178. His First Sergeant is Sgt. Sivic, 2nd Bn, Co. C, SESS. He has a clean bill, no articl 15. He received a letter of recommendation in basic training for outstanding soldier in basic training. He has an outstanding 109th mail clerk record in Germany and a life time guarantee of a job there if he ever returned.

See attached copies of Military History at Ft. Gordon.

ECONOMIC STATUS:
Cash: Nil
Liabilities: Car payment and life and car insurance
Rents apartment for $127.00/month-Government Housing Authority
Car-1973 Nova Chevrolet $2795.00

MARITAL STATUS:

Moore is married to Francine Carletina McClendon Moore, age 19, residing at 1149 East Rich Street, Columbus, Ohio. She is unemployed. She was attending school at the time of marriage, graduated and attending college for two semesters. The date of marriage is December 25, 1970. They have one child, 3 years of age,

William Neal Moore, Jr., born in May 11, 1971, in Columbus, Ohio, at University Hospital. Moore states that the last time he saw his wife was on April 6, 1974. He states that they seem to have no marriage problems and that he dated her for four years before marriage.

RECREATIONAL ACTIVITIES:

For approximately five years, Moore attended Kent Elementary School from 6:00 to 10:00 p.m., working with clay in sculpture work in recreation facilities. He played chess, table tennis, volley ball, and basketball.

Moore states that his closest friends are Robert Edwards, who played basketball with him in Junior High School and they hung around together; and Robert Parker who had the same interests as Moore.

COMMUNITY ATTITUDE:

Captain Hatfield, Commanding Officer of Ft. Gordon states that he has just been transferred to Ft. Gordon and does not know too much about this soldier. He states that he was not doing anything good or anything bad.

Personal contact was made with First Sergeant of the company who stated that he was transferred about the same time as the Commanding Officer. He states that he doesn't know of any trouble that Moore has been in except not coming in uniform to pick up his pay check.

Sergeant Reiner states that Moore was a squad leader for 12-16 men and he never received any back talk.

See attached copies for community attitude.

RECOMMENDATION:

This investigator does not wish to make a recommendation.

/s/ J. Clark Rachels
J. CLARK RACHELS
PROBATION & PAROLE SUPERVISOR

IN THE SUPERIOR COURT
OF TATTNALL COUNTY
STATE OF GEORGIA

WILLIAM NEAL MOORE, Petitioner	)	
v.	)	Civil Action No. ___
JOE S. HOPPER, WARDEN, Respondent	)	Habeas Corpus

AFFIDAVIT

GEORGIA, JEFFERSON COUNTY.

Personally appeared before the undersigned attesting officer, who under the laws of the State of Georgia is authorized to administer oaths, J. CLARK RACHELS, who after being duly sworn, on oath deposes and says that he is a duly appointed Probation-Parole Supervisor of the State of Georgia and that Jefferson County, Georgia, is assigned to his jurisdiction, that he has served in this capacity for the past seven years and he further says:

(a) That on the 4th day of June, 1974, upon WILLIAM NEAL MOORE entering a Plea of Guilty in Jefferson Superior Court to the offenses of Murder and Armed Robbery that he was instructed by the Court to make a pre-sentence investigation of the matter and make his findings known to the Court on the 17th day of July, 1974, same being the date set for sentencing WILLIAM NEAL MOORE on these charges;

(b) Deponent further says that he made the pre-sentence investigation directed by the Court, that he discussed the matter in detail with Hinton Pierce, Attorney at Law, Augusta, Georgia, Attorney for the

Defendant and with WILLIAM NEAL MOORE, Defendant, and based on information furnished by Mr. Pierce and several interviews with WILLIAM NEAL MOORE that he incorporated the information received in said pre-sentence report and contacted those parties that WILLIAM NEAL MOORE requested be interviewed and incorporated the information derived from them in the report;

(c) Deponent further says that on the 17th day of July, 1974, the date set for sentencing, he furnished, prior to sentencing, the original of the pre-sentence report to the Presiding Judge, HONORABLE WALTER C. McMILLAN, JR., that he furnished a copy of the complete report to HONORABLE H. R. THOMPSON, District Attorney, Middle Judicial Circuit of Georgia, and a copy of the complete report to MR. HINTON PIERCE, Attorney at Law, Augusta, Georgia, Attorney for the Defendant;

(d) Deponent further says that MR. HINTON PIERCE, Attorney at Law, Augusta, Georgia, Attorney for the Defendant, requested a short recess prior to sentencing, that he may have time to review the contents of the pre-sentence report in order to determine if he desired to make comments about those contents;

(e) Deponent further says that in his presence Attorney Pierce showed the pre-sentence report to WILLIAM NEAL MOORE and asked WILLIAM NEAL MOORE if the contents of the personal statement contained in the report is what WILLIAM NEAL MOORE related to the officers and WILLIAM NEAL MOORE answered in the affirmative;

(f) Deponent further says that the pre-sentence report furnished to the Court was the identical pre-sentence report furnished to the State and the Defendant;

(g) Deponent further says that he furnished no confidential information to the Court relating to this matter.

/s/ J. Clark Rachels
J. CLARK RACHELS
PROBATION-PAROLE SUPERVISOR
MIDDLE JUDICIAL CIRCUIT OF GEORGIA,
INCLUDING JEFFERSON COUNTY, GEORGIA.

Sworn to and subscribed before me,
this 20th day of March, 1978.
/s/ Michael R. Jones
~~NOTARY PUBLIC~~
~~MY COMMISSION EXPIRES~~
Clerk Superior Court
Jefferson County, Georgia

(p.40) HABEAS CORPUS - William Neal Moore

to Mr. Thompson and I think he and I both walked down stairs together and as I recall it, he filed it in the Clerk's office at that time. That's the way I remember it.

Q. Then this was after the proceedings in court?

A. Yes, sir. Now, I will say this. I might add this. I had the impression that when the Judge went out to make his decision, that when he came in, the sentence had already been prepared before he ever came to uh, Louisville that day. Of course, that could have been just for the purpose of him saving time in the event he did decide to impose the death penalty.

Q. How long was that recess that the court took? The, in order to, prior to returning the sentence?

A. I wouldn't think it was over 30-45 minutes at the most.

Q. Uh, do you recall seeing the presentence report?

A. No, sir, I haven't.

Q. You've already submitted, I think, an affidavit to that effect haven't you?

A. Yes, yes, I did.

Q. Uh, do you recall ever discussing with uh, Mr. Moore, the arrest record that appeared in it?

A. We talked about his juvenile offenses and I had discussed those with his family, they were . . .

Q. But not with reference to the presentence report?

A. No, no. I haven't, I'll say this, I have never seen a presentence investigation report prior to sentencing in any State Court (p.41) that I can recall. And I'm, I'm sure if I had seen it in this case, I would have remembered it, because it would have been most unusual. In the Federal Courts now, I think Judge Alimo, I know he makes you read it before hand. Uh, but in this case, when I went up to the Supreme Court I was, I was trying to remember, I knew I'd went through my entire file after I left up there and had I been given a copy of the presentence investigation report, I certainly would have had it in my file and I did not have it. And I've got two suitcases full of file back there, so, it would have been in there, if it had been given to me, I wouldn't have thrown it away, I would have had it. The only time I saw it aas (sic) in the transcript when I went up to the Supreme Court.

Q. Uh, when you argued or took the case to the Supreme Court on the appeal, uh, you, you attempted to argue uh, comparative sentencing?

The Court: Came to argue what, I'm sorry, excuse me.

Q. To argue comparative sentences.

The Court: Comparative, all right, okay.

A. Well my main argument was mitigat-, mitigating circumstances, that's . . .

Q. And you, you were personally aware of similar cases or even more aggravated cases?

A. Well when I submitted with my brief, of course, as Mr. Dunsbar, Dunsmore remembers I went outside the record and I submitted affidavits from two lawyers who had handled two similar cases.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

WILLIAM NEAL MOORE, PETITIONER	)	
vs.	)	CIVIL NO. ___
CHARLES BALKCOM, WARDEN,	)	
RESPONDENT	)	

PETITION FOR A WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. 2241-54 and in conformity with Rule 2 of the rules governing such cases in the District Courts, William Neal Moore, by counsel, respectfully petitions this Court on the following basis for a writ of habeas corpus directed to the Respondent:

1. The Respondent is the Warden of the Georgia State Prison at Reidsville, Georgia, and there, within the jurisdiction of this Court, he holds the Petitioner under a sentence which the Jefferson Superior Court has pronounced upon him.

2. The Jefferson Superior Court originally pronounced its judgment on July 17, 1974.

3. Its judgment was that the Petitioner be put to death. His execution has been scheduled for 4 December, 1978.

4. It pronounced a single judgment on an indictment charging the Petitioner in two counts with the murder and armed robbery of Fredger Stapleton. If found as the sole statutory aggravating circumstance required by Georgia Code Annotated 27-2534.1 that the homicide "was committed while the accused . . . was engaged in the commission of another capital felony, i.e., armed robbery," id. (b) (2).

5. Its judgment rested upon a general plea of guilty.

6. The Hon. Walter C. McMillan, Jr., Judge of the Middle Judicial Circuit, pronounced judgment without the intervention of a jury.

7. The Petitioner made statements to the trial court during both the plea and sentencing proceedings.

8. As the Petitioner was sentenced to death, there was a mandatory direct appeal.

9. In February 1975, the Supreme Court of Georgia, one Justice dissenting, affirmed the conviction and sentence and shortly thereafter denied a motion for a rehearing, *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975), cert. den., 428 U.S. 910 (1976). It affirmed against challenges to the constitutionality of the Georgia capital punishment statute and against a contention that the sentence in the particular case was comparatively disproportionate under the facts.

10. The Petitioner has filed other actions in the State courts assailing his conviction and sentence.

11(a). In 1977, he filed an action for a declaratory judgment in the Jefferson Superior Court seeking a resentencing on the ground that "at the time of his death sentence the trial judge may not have imposed it except for a mistaken belief that such sentence would never be upheld by the U.S. Supreme Court," *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). Relief was denied without a hearing and that order was affirmed on direct appeal.

(b). A subsequent effort in the trial court to withdraw his plea of guilty also proved futile. No hearing was held on that motion and the appeal was not perfected when the State Supreme Court declined to grant a stay of execution.

(c). Finally, the Petitioner also filed in the Tattnall Superior Court for a State writ of habeas corpus on the grounds that his conviction and sentence violated rights secured him under the Eighth and 14th Amendments because (1) his prior arrest record was presented to the trial judge in a pre-sentence report without the Petitioner or his counsel being afforded a fair opportunity to address it; (ii) his conviction and sentence were reviewed on a deficient record which lacked the transcript of the District Attorney's closing arguments; (iii) insofar as the conviction and judgment were for malice-murder, his guilty plea was legally unintelligent and involuntary and lacked a proper factual basis; (iv) he was denied his right to enjoy the effective assistance of counsel because he was left unaware of his right, absolute under Georgia Code Annotated 27-1404, to withdraw his plea of guilty after the oral pronouncement of judgment but before the written judgment was actually filed with the Clerk; and (v) his sentence was disparate and improperly reviewed on appeal from the standpoint of "similar cases, considering *both* the crime *and the defendant*," Georgia Code Annotated 27-2537(c) (3), because the death penalty has never been regularly imposed upon youthful offenders with no significant prior criminal record and no prior confinement, who have no prior history of violent behavior, who pose no obvious future threat to

society, who suffer no impairment to potential rehabilitation, and who (in the words of the trial judge) "did everything that a man could do after [he was] caught [to] to an honorable thing insofar as [his] true statements . . . , [his] cooperation with the official, pleading guilty to the mercy of the court" and exhibiting a "willingness . . . forthrightness in meeting what must be . . . a terrible, terrible experience." After a hearing, on July 13, 1978 the Tattnall Superior Court denied relief and dissolved its stay of execution. On October 17, 1978 the State Supreme Court denied an application for a certificate of probable cause to appeal and dissolved the stay of execution which it had previously ordered.

(d). During his efforts to appeal in the State habeas proceedings, the Petitioner also filed an action in this Court, *Moore v. Balkcom*, Civ. No. 78-224, under 28 U.S.C. 2254 when it appeared necessary in order to secure a stay of execution. That action was voluntarily dismissed without prejudice when the State Supreme Court granted a stay.

12(a). The District Attorney's arguments urging that the Petitioner be executed were not taken down or transcribed and they were thus not before the State Supreme Court when it reviewed the case on direct appeal.

(b). Without a full disclosure to the reviewing court of the basis for the death sentence, the procedures by which the Petitioner's sentence was imposed and sustained violate the requirements of the Eighth and 14th Amendments.

13(a). In the June 4, 1974 proceedings when the Petitioner tendered his plea of guilty, neither the elements of murder, the distinctions between malice-murder and felony-murder, and the factual basis of his offense was developed in any detail. Essentially, the Petitioner was asked only if he understood that he was charged with murder and armed robbery and whether he was in fact guilty.

(b). The only factual development for the charges occurred during the July 17 sentencing proceedings and derived from the Petitoner's confession and in-court statement. He stated, "I didn't have no intention of killing him. When I went in there, he came out there with a shotgun and hit me in the leg, it scared me, made me shoot him." "I was fixing to go into his bedroom, and he came out with his shotgun and he fired, and I just shot." Other evidence confirmed that the victim fired his shotgun as recounted by the Petitioner.

(c). Nowhere in the whole proceedings or in his lawyer's counseling were the legal elements of malice-murder and felony-murder outlined to the Petitioner. The Petitioner did not comprehend the distinction but he never admitted that he actually intended to kill the victim as is necessary for malice-murder.

(d). The trial judge made no specific notation of which particular type of murder the Petitioner was adjudged guilty of but, consistently with Georgia law which makes the felony a lesser included offense within felony-murder, it imposed no separate judgment for the armed robbery count.

(e). While the distinction is unimportant on the question of guilt, it is of critical importance from the standpoint of the proper comparison of the case with "similar cases, considering . . . the crime" since felony-murder may involve an indeliberate homicide for which death should not be exacted.

(f). The Petitioner did not intelligently or voluntarily plead guilty to killing the victim deliberately and the factual basis for that offense did not exist.

14(a). The Petitioner was unaware that he had a right, absolute under Georgia Code Annotated 27-1404, to withdraw his plea of guilty in the interval between the oral pronouncements of the sentence and the actual filing of the written judgment with the clerk.

(b). During this critical stage of the proceedings, he was denied his right under the Sixth and 14th Amendments to have the effective assistance of counsel.

15(a). At the time of the homicide, the Petitioner was under 23 years of age. He had no significant criminal record and no record whatever of violent behavior. He had not previously even been penally confined. There was no indication that he suffered any sort of psychiatric or personality disorder which would make him a future threat to society or which would impair his rehabilitation. His conduct and attitude, from his arrest through his conviction, was distinguished by remorse for his act and cooperation with the authorities.

(b). Neither in Georgia nor elsewhere has the death penalty ever been reserved for such offenders

and the State cannot show a single such case, much less an intelligible pattern.

(c). On its face, Georgia Code Annotated 27-2537(c) (3) requires the State Supreme Court to compare any death sentence to those in "similar cases, considering both the crime and the defendant," and it was partially on the basis of this safeguard that the Supreme Court sustained Georgia capital sentencing procedures.

(d). However, the Supreme Court of Georgia failed to apply the second prong of its responsibilities to assure against the wanton and freakish imposition of the death sentence but compared the Petitioner's sentence only with "similar cases, considering . . . the crime."

(e). Since the duty of comparison was allocated only to the State Supreme Court, the trial judge never undertook to compare the sentence to those in "similar cases, considering . . . the defendant." Moreover, the sentence does not otherwise reflect the conscience of the community because it was imposed without the intervention of a jury.

(f). From the standpoint of comparable defendants and from the standpoint of the mitigatory circumstances which pertained to him, the Petitioner's sentence of death was imposed arbitrarily and freakishly on a member of a category of salvagable offenders for whom the extreme penalty has never been reserved. In the Petitioner's particular case, it constitutes cruel and unusual punishment prescribed by the Eighth and 14th Amendments.

16. All of the grounds raised in Paragraphs 12-15 have been presented to the State courts in either the direct or the pending collateral proceedings.

17. The Hon. Hinton Pierce was retained by the family to represent the Petitioner and did so through all of the proceedings in the trial court. His address is 213 Southern Finance Building, Augusta, Georgia 30902. James C. Bonner, Jr., Prisoner Legal Counseling Project, University of Georgia School of Law, Athens, Georgia 30601, has represented the Petitioner as volunteer counsel in the proceedings for relief by writ of habeas corpus.

18. As previously alleged, no separate judgment was ever entered on the armed robbery count.

19. The Petitioner has no outstanding sentence to be served besides the one at issue in this case.

WHEREFORE, the Petitioner respectfully requests that this Court grant the Petitioner relief from his sentence of death as required by law and justice.

This 17th day of November, 1978.

/s/ James C. Bonner, Jr.
Counsel for the Petitioner

Prisoner Legal Counseling Project
University of Georgia School of Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

WILLIAM NEAL ("Billy") MOORE, PETITIONER	)	
vs.	)	CIVIL NO. ___
CHARLES BALKCOM, WARDEN, RESPONDENT	)	

AFFIDAVIT SUPPORTING PETITION

William Neal Moore, being first duly sworn, identifies himself as the Petitioner named in the above-styled application for a writ of habeas corpus and states upon his oath that the matters and things sets forth therein are true and correct to the best of his knowledge and belief.

/s/ William N. Moore
William Neal Moore

Sworn to and subscribed before me this 24th day of October, 1978.

/s/James C. Bonner, Jr.
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

WILLIAM NEAL MOORE, PETITIONER	)	
vs.	)	
CHARLES BALKCOM, WARDEN,	)	CIVIL NO. ___
RESPONDENT	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1978, I mailed first-class a copy of the attached pleadings to each of:

1. Charles Balkcom, Warden
   Georgia State Prison
   Reidsville, Georgia 30453

2. Attorney General Arthur Bolton
   Assistant Attorney General John Dunsmore
   132 State Judicial Building
   40 Capitol Square, S.W.
   Atlanta, Georgia 30334

/s/ James C. Bonner, Jr.
Counsel for the Petitioner

Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601
(404) 542-4241

Prisoner's Name: WILLIAM NEAL MOORE

Prison Number: D-103403

Place of Confinement: Georgia Diagnostic and Classification Center, Jackson, Georgia.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

WILLIAM NEAL MOORE, Petitioner,	)	
vs.	)	Civ. Action No. 478-309
WALTER D. ZANT, Warden,	)	
Respondent.	)	

AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Preliminary explanation: The allegations of this petition are in the form dictated by the Model Form For Use in Applications for Habeas Corpus under 28 U.S.C. §2254, prescribed by the Rules Governing Section 2254 Cases in the United States District Courts.

Paragraphs 1 through 11 state the history of prior state court proceedings; paragraphs 12 through 14 summarize the facts of the case; paragraphs 15 through 47 state the petitioner's federal constitutional claims; and paragraphs 48 through 53 contain required technical information.

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

The Superior Court of Jefferson County,
Jefferson County Georgia.

2. The date of the judgment of conviction and sentence is July 17, 1974.

3. The sentence is that petitioner be put to death by electrocution.

4. The nature of the offense involved is that the petitioner was convicted of the offense of murder while engaged in the commission of another capital felony, to wit, armed robbery, in violation of Ga. Code Ann. §27-2534.1(b)(2).

5. The petitioner entered a plea of guilty to the offense charged.

6. There was no trial as to the issue of guilt or innocence. The sentencing hearing was had before the court without intervention of a jury.

7. The petitioner made statements to the court during the entry of the guilty plea, and the petitioner testified during the sentencing hearing before the court.

8. The petitioner appealed his conviction and sentence of death.

9. The facts of the petitioner's appeal are as follows:

(a) The Supreme Court of Georgia affirmed the petitioner's conviction and sentence in a *per curiam* opinion, with one justice dissenting, on February 12, 1975; on March 4, 1975, that Court denied a timely petition for rehearing. *Moore v. State*, 233 Ga. 861, 213 S.E. 2d 829 (1975).

(b) On July 6, 1976, the Supreme Court of the United States denied a timely petition for a writ of *certiorari*. *Moore v. Georgia*, 428 U.S. 910 (1976). (Justices Brennan and Marshall were of the opinion that *certiorari* should be granted.) On October 4, 1976, the Supreme Court denied a timely petition for rehearing. *Moore v. Georgia*, 429 U.S. 873.

10. Other than the appeal described in paragraphs 8 and 9 above, the only petitions, applications, motions, or proceedings filed or maintained by the petitioner with respect to the 1974 conviction and sentence of the Superior Court of Jefferson County are those described in paragraph 11 below.

11.(a) On ___, 1977, the petitioner filed an action for a declaratory judgment in the Jefferson County Superior Court seeking a new sentencing proceeding. Relief was denied without a hearing, and that order was affirmed by the Georgia Supreme Court. *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). On ___ 1977, the Supreme Court of the United States denied a timely petition for writ of *certiorari*. ___ U.S. ___ (1977).

(b) On ___, 1977, the petitioner filed a motion to withdraw the plea of guilty. The motion was denied without a hearing, and the appeal was not perfected when the Supreme Court of Georgia declined to grant a stay of execution.

(c) On ___, 1977, the petitioner filed a petition for writ of *habeas corpus* in the Superior Court of Tattnall County; a hearing was held on March 30, 1978, and on July 13, 1978, the court denied all relief sought. On October 17, 1978, the Supreme Court of Georgia

denied an application for a certificate of probable cause to appeal from the denial of *habeas* relief by the trial court.

(d) On ___, 1978, the petitioner filed a petition for writ of *habeas corpus* and application for stay of execution in this Court, *Moore v. Balkcom*, Civ. No. 78-224. That action was voluntarily dismissed without prejudice when the Supreme Court of Georgia granted petitioner a stay of execution.

12. The petitioner was convicted and sentenced in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, for each of the reasons set forth below.

I. INTRODUCTORY FACTS

13. William Neal Moore pled guilty, was convicted and was sentenced to death for the murder and armed robbery of Fredger Stapleton, which offense occurred on April 2, 1974.

14. At the sentencing hearing on July 17, 1974, the State and the defense presented testimony, which the Supreme Court of Georgia summarized as follows:

> The testimony and other evidence revealed the appellant had been a member of the U.S. Army, and a former military policeman, where he met George Curtis, a nephew of the victim Fredger Stapleton. Curtis told him about his uncle Fredger Stapleton having money and showed him where he lived. In the words of the defendant, "We planned this, he wanted to burn his uncle up, he would get the money and burn him up in the house, and we went over there and Curtis got scared after he went into

> the house, that was the first time. We was drinking, we had been drunk . . . We went over to the house . . . We went to the back door, and we got in between one of the bedrooms and the front room. There was a locked door, we left and went back over to Curtis' house. Curtis, he left, and I went back over there . . . "
>
> In the late evening of April 2, 1974, appellant apparently re-entered the Stapleton home through a bedroom window. After gaining entrance, he was surprised by Stapleton, who proceeded to fire a shotgun at him. Appellant fired all five shots in his .38 caliber pistol at Stapleton. Stapleton subsequently died from two bullet wounds in the chest. After shooting Stapleton, appellant proceeded to remove two billfolds from the victim's pocket and took the victim's shotgun. Appellant then left through the front door of the Stapleton home and walked to his automobile which was parked by a laundromat nearby. He proceeded to his residence, burned the victim's wallets, and disposed of the shotgun. The money taken from Stapleton amounted to $5,700, which appellant subsequently surrendered to officers. Evidence at the scene implicated the appellant and corroborated his statement.
>
> Appellant denied any intention of killing Stapleton: "I didn't have no intention of killing him. When I went in there, he come out there with a shotgun and hit me in the leg, it scared me, made me shoot him, and I'm sorry for what I did and ask for mercy of the Court."
>
> . . . .
>
> The trial judge found as mitigating circumstances that the appellant did everything that a man could do after he was caught, and did an honorable thing in making true statements, cooperating with the officials, and pleading guilty. In addition to these circumstances appellant urges

consideration of the following: that he fully cooperated with the police; that he is twenty-three years old; that he is not an experienced criminal; and that he started shooting from a combination of fright and intoxication.

Moore v. State, 233 Ga. 861, 862, 865; 213 S.E.2d 829 (1975).

II. GROUNDS OF CONSTITUTIONAL INVALIDITY OF PETITIONER'S CONVICTION AND SENTENCE.

15. Punishment of the petitioner by death is cruel and unusual in consideration of all factors relating to the offense and the offender, including mitigating circumstances. For this reason, the imposition and execution of the death sentence against the petitioner violates the rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts supporting petitioner's claim that his punishment is cruel and unusual in consideration of all the factors relating to the offense and the offender, including mitigating circumstances.

16. Various circumstances both within and without the record are present in this case which, by common consensus, should be deemed to warrant mitigation of petitioner's sentence. They include the following:

(a) The petitioner was twenty-three years old at the time of the offense.

(b) The petitioner had no prior record of violent crime.

(c) According to the testimony of the petitioner, which was corroborated by the State's evidence, the petitioner did not intend the death of the victim.

(d) According to the testimony, the petitioner had been drinking heavily at the time the offense allegedly was committed and therefore lacked the capacity deliberately to intend the death of the victim.

(e) At the time of the offense, the petitioner was a member of the United States Army and had been for several years, and had served his country in the United States and Germany.

(f) At the time of the offense, the petitioner was estranged from his wife and had custody of their three-year-old son and was the sole caretaker and provider for their son.

(g) At the time of the offense, the petitioner's paycheck was being sent directly to his wife, pursuant to an arrangement made when the petitioner was in the service in Germany and when the petitioner's wife had custody of their child, and the petitioner was without funds to care for his son properly.

(h) The petitioner cooperated fully with the police, confessed his involvement in the offense, and pled guilty to the charges. In the words of the sentencing judge, "You, in my opinion, did everything that a man could do after you were caught and did an honorable thing insofar as your true statements made, your cooperation with the officials, pleading guilty to the mercy of the Court . . . I also found . . . mitigating circumstances . . . those being your willingness and

your forthrightness in what must be to you a terrible, terrible experience."

(i) The circumstances leading up to the crime were initiated by another person, George Curtis, who participated in the early stages of the crime, yet only the petitioner was tried for crime.

17. The sentence of death that was imposed by the trial judge against the petitioner was based in part on a pre-sentence report which was not disclosed to the petitioner, in violation of the rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States, as set forth in *Gardner v. Florida*, 430 U.S. 349 (1977).

Facts supporting petitioner's claim that his punishment is unconstitutional, because it was based in part on an undisclosed pre-sentence report.

18. The sentencing judge requested that a pre-sentence investigation be conducted, and pursuant to that request, the Department of Offender Rehabilitation Community-Based Services prepared a "Case Study" concerning the petitioner and submitted the Case Study to the sentencing judge on July 17, 1974. The Study is thirteen pages long; five pages were prepared by J. Clark Rachels, Probation and Parole Supervisor, and the other eight pages are reports from investigative officers and other State witnesses. The report includes a section entitled "Record of Previous Offenses," and includes summaries of interviews with relatives of the deceased, and includes detailed, personal information about the petitioner.

19. The pre-sentence report entitled Case Study was not disclosed to either the petitioner or his attorney.

20. The conviction was obtained against the petitioner by a plea of guilty that was not knowingly, voluntarily, or intelligently made, in violation of petitioner's rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

Facts supporting petitioner's claim that his plea of guilty was not made knowingly, intelligently, or voluntarily.

21. At his arraignment on June 4, 1974, the petitioner entered a plea of guilty to the indictment. After an evidentiary hearing conducted on July 17, 1974, the Court convicted the petitioner on his plea of guilty and sentenced him to death.

22. The petitioner pled guilty to a two-count indictment. The first count of the indictment charged the petitioner with malice murder. At no time was the petitioner advised, by his attorney or by the Court, that one of the elements of malice murder is specific intent to kill the victim. Indeed, in his testimony at the hearing on July 17, 1974, the petitioner stated that he did not intend to kill the victim. Consequently, the petitioner's plea of guilty to count one in the indictment was not voluntarily, knowingly, or intelligently entered.

23. On July 17, 1974, immediately after finding the petitioner guilty of malice murder as charged and pursuant to the petitioner's plea of guilty, the trial judge sentenced the petitioner to death. The petitioner was not advised, by his counsel or by the Court, that he

could withdraw his plea of guilty after the sentence of death had been pronounced.

24. The death penalty is in fact administered arbitrarily, capriciously, and whimsically in the State of Georgia; and the petitioner was sentenced to die, and will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of the death penalty, in violation of his rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts supporting petitioner's claim that the death penalty is administered arbitrarily, capriciously and whimsically by the State of Georgia.

25. The Supreme Court of the United States upheld the Georgia Punishment Statutes "[o]n their face" only upon the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. *Gregg v. Georgia*, 428 U.S. 153, 198 (1976). As those statutes have been applied, however, death sentences in Georgia have in fact been imposed in an arbitrary and capricious manner.

26. Georgia cases similar to that of the petitioner in many respects, including the nature and circumstances of the offense, the age, the prior record, and the life and character of the accused, have resulted in lesser punishments than death.

27. Georgia cases more aggravated than that of the petitioner in many respects, including both the nature and circumstances of the offense and the age,

prior record, relative culpability, and the life and character of the accused have resulted in lesser punishments than death.

28. There is no rational, constitutionally permissible way of distinguishing the few cases in which the death penalty has been imposed from the many cases in which it has not been imposed in Georgia.

29. Georgia statutory provisions and actual practices governing appellate review of death sentences:

(a) denied petitioner the effective assistance of counsel;

(b) denied petitioner a fundamentally fair hearing and a reliable determination of the issue of life or death, and;

(c) denied petitioner the effective assistance of counsel and the basic tools of an adequate defense and appeal because of his poverty, all in violation of his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Facts supporting the claim that Georgia appellate procedures denied petitioner the effective assistance of counsel, the tools of an adequate defense and a fundamentally fair hearing.

30. The Supreme Court of the United States upheld the constitutionality of the Georgia capital punishment statutes "[o]n their face" only upon the assumption that they provided for meaningful and effective appellate review that would function adequately to prevent arbitrariness in capital sentencing, including review procedures through which the Georgia

Supreme Court would compare each capital case with other cases to determine whether the sentence in the case under consideration was disproportionate to that administered in other, similar cases. *Gregg v. Georgia*, 428 U.S. 153, 166-67, (1976).

31. In fact, a number of the cases cited by the Georgia Supreme Court in its comparative "proportionality review" in petitioner's case pre-date *Furman v. Georgia*, 408 U.S. 238 (1972), and were condemned as arbitrary and capricious by *Furnam*. Moreover the Georgia Supreme Court in its review of petitioner's death sentence did not consider an adequate sample of homocide cases which did not result in death sentences, including cases that are not rationally differentiable from petitioner in relation to the justification for imposing capital punishment.

32. In its comparitive "proportionality review," the Georgia Supreme Court considers and refers to prior cases in which the reported decisions do not describe the underlying facts of the crime or the character of the criminal offender. This practice completely disables counsel for an indigent condemned inmate like petitioner from preparing or presenting argument, from representing his client in any effective way in the process of appellate review, or from ascertaining and responding to facts deemed significant by the Georgia Supreme Court in its sentencing review, because such counsel cannot practicably obtain adequate information relating to the comparison cases by reason of his client's poverty.

33. The Georgia Supreme Court, in both petitioner's case and in those of other death-sentenced persons, has never articulated or followed any clear standard of review, with respect to the findings it is required to make under Ga. Code Ann. §27-2537(c).

34. The Supreme Court of the United States upheld the constitutionality of the Georgia capital punishment statutes only upon the assumption that they provided for meaningful appellate review, including review procedures through which the Supreme Court of Georgia would determine whether the sentence of death was imposed "under the influence of passion, prejudice, or any other arbitrary factor." However, in its review of petitioner's death sentence, the Georgia Supreme Court did not consider the final argument made to the judge by the prosecuting attorney, since the final argument was not transcribed or made part of the record on review. Without having before it the prosecuting attorney's final argument to the judge concerning sentence, the Supreme Court of Georgia could not determine whether elements of passion, prejudice, or any other arbitrary factors were placed before the judge for his consideration in determining sentence.

35. The sentence of death was imposed upon the petitioner under the influence of passion, prejudice, or other arbitrary factors, in violation of petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts supporting the claim that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor.

36. Shortly before the petitioner was arraigned, pled guilty and was sentenced to death for the murder and armed robbery of Fredger Stapleton, an elderly couple had been murdered in Jefferson County. The entire community was upset and outraged by the unsolved murder of the elderly couple. Not only were the district attorney who prosecuted the petitioner and the judge who sentenced the petitioner residents of this community, they were also elected by the citizens of this community.

37. The petitioner's death sentence was imposed under the influence of an arbitrary factor, in violation of the rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts supporting petitioner's claim that the death sentence was imposed under the influence of an arbitrary factor.

38. The sentencing judge did not believe that the petitioner would actually be executed as a result of the judge's sentence of death. After pronouncing the sentence of death, the judge stated, "I have many, many reservations about whether there will be an execution by government authorities in this county ever again."

39. The sentencing judge did not believe that the petitioner would actually be executed, because the judge thought that the Georgia death penalty statute would be declared unconstitutional because it was not a mandatory statute.

40. The sentencing judge did not believe that he had the discretion to refrain from imposing the death

sentence, even though he thought that death was disproportionate as compared with sentences imposed in similar cases.

41. The sentencing judge mistakenly believed that the mitigating circumstances had to be, "sufficient to wipe out the aggravating statutory circumstances," before he could impose a life sentence.

42. The theoretical justifications for the death penalty are groundless and irrational in fact, and death is thus an excessive penalty which fails factually to serve any rational and legitimate social interests that can justify its unique harshness, in violation of petitioner's rights guranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts supporting petitioner's claim that the theoretical justifications for the death penalty are groundless in fact.

43. The death penalty provided by Georgia law violates the principle that a criminal sanction, "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

44. Executions do not have an identifiable deterrent effect. As the Georgia State Department of Offender Rehabilitation acknowledged in a November, 1972 study entitled *Capital Punishment in Georgia: An Empirical Study 1943-1965*, "Despite the fact that Georgia used the death penalty more often than any other state in the country, its homicide rate was also the highest in the nation. *This suggests that the death*

penalty is not effective as a deterrent." Study at 451 (emphasis added).

45. Executions by the State set socially-sanctioned examples of, and provide an inducement to, violence.

46. Public sentiment for retribution is not so strong as to justify use of the death penalty.

47. There is no penal purpose served by the death penalty which is not more effectively or efficiently served by life imprisonment.

48. Each of the grounds listed in paragraphs 15 through 47 has been presented to the Georgia courts, and each has been rejected by the Georgia courts.

49. There are no petitions or appeals pending presently in any state or federal court relating to the judgment and sentence under attack.

50. William Neal Moore was represented by the following attorneys:

(a) At trial and on appeal to the Supreme Court of Georgia, by Hinton R. Pierce, Augusta, Georgia;

(b) On petition for *certiorari* to the Supreme Court of the United States, by Hinton R. Pierce.

(c) On the motion for a declaratory judgment (and the appeal from denial of that motion), and on the motion to withdraw the plea of guilty, by Hinton R. Pierce;

(d) On the state *Habeas corpus* petition in the Superior Court of Jefferson County, by James C. Bonner, Jr., Athens, Georgia.

51. Hinton R. Pierce was retained by petitioner's family to represent the petitioner at trial. Mr. Pierce was court-appointed to represent the petitioner on appeal on the basis of findings that the petitioner was indigent and unable to pay private counsel any longer. The other attorneys named above have represented the petitioner as volunteers without compensation.

52. On the judgment of Juy 17, 1974, that is challenged in this proceeding, the petitioner was sentenced to two counts of one indictment, and only on one indictment, in the same court, at the same time.

53. The petitioner has no sentence to serve other than the sentence of death which is challenged herein.

WHEREFORE, the petitioner William Neal Moore prays that this Court:

1. Issue a writ of *habeas corpus* to have petitioner brought before it to the end that he may be discharged from unconstitutional confinement and restraint and/or relieved of the unconstitutional sentence of death;

2. Conduct a hearing at which proof may be offered concerning the allegations of this petition;

3. Permit the petitioner, who is indigent, to proceed without prepayment of costs or fees;

4. Grant the petitioner, who is indigent, sufficient funds to secure expert testimony necessary to prove the facts as alleged in this petition;

5. Grant the petitioner the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in this petition;

6. Allow the petitioner a period of sixty days, which period shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

7. Stay the petitioner's execution pending final disposition of this petition; and

8. Grant such other relief as may be appropriate.

WHEREFORE, William Neal Moore, being first duly sworn under oath, states that he has read the above amended petition for writ of *habea corpus* and states that the information contained herein is true and correct to the best of his knowledge, information, and belief.

/s/ William Neal Moore
William Neal Moore, Petitioner

Sworn to and subscribed before me this ___ day of ___, 1980.

/s/
Notary Public

RESPECTFULLY SUBMITTED, this 1st day of October, 1980.

/s/ H. Diana Hicks
H. Diana Hicks
P.O. Box 120636
Nashville, Tennessee 37212
(615) 383-9610

Attorney for the Petitioner

CERTIFICATE OF SERVICE

I certify hereby that on this 1st day of October, 1980, I served a copy of the foregoing AMENDED PETITION upon John Dunsmore, 132 State Judicial Building, 40 Capital Square, Atlanta, Georgia, 30334, who is the attorney for the respondent, by depositing same in the United States mail, properly addressed and postage prepaid.

/s/ H. Diana Hicks

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

WILLIAM NEAL MOORE, Petitioner, pro-se	)	
Vs.	)	CIVIL NO. CV 478-309
CHARLES BALKCOM, WARDEN,	)	
Respondent	)	

AFFIDAVIT SUPPORTING PETITION

William Neal Moore being duly sworn identifies himself as the Petitioner named in the above styled application for Amendment to Writ of Habeas Corpus and states upon his oath that the matters and things set forth are true, and correct to the best of his knowledge and belief.

/s/ William N. Moore
William Neal Moore
Pro-se

Sworn to and Subscribed before me this 15 day of Feb., 1979.

/s/ John Woods
Notary Public

My Commission Expires: JOHN L. WOODS, Notary Public, Georgia State at Large, My Commission Expires May 9, 1980.

SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

WILLIAM NEAL MOORE, Petitioner, pro-se	)	
Vs.	)	CIVIL NO. CV 478-309
CHARLES BALKCOM, WARDEN,	)	
Respondent	)	

AFFIDAVIT OF POVERTY

William Neal Moore, being first duly sworn, identifies himself as the Petitioner in the above-styled Petition in which he seeks a amendment to a writ of Habeas Corpus under 28 U.S.C. 2254 challenging his sentence of death on grounds, inter Alia, that it violates his rights secured him by the Sixth, Eighth and Fourteenth Amendments because (1) Ineffectiveness of Counsel. (2) Unconstitutional Review on Direct Appeal, in the State Supreme Court.

He further states upon his oath, however, that he has ($___ in his prison account, that he is an indigent and that, although he believes in good faith that he is entitled to the relief that he seeks, he is unable to prepay or post security for the fees and costs normally required in an action of this nature.

His petition for leave to proceed under 28 U.S.C. 1915 is Attached.

/s/ William N. Moore
William Neal Moore
Petitioner Pro-se

Sworn to and Subscribed before me this 15 day of Feb., 1979.

/s/ John L. Woods
Notary Public

My Commission Expires: JOHN L. WOODS, Notary Public, Georgia State at Large, My Commission Expires May 9, 1980.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

WILLIAM NEAL MOORE, Petitioner, pro-se	)	
Vs.	)	CIVIL NO. CV 478-309
CHARLES BALKCOM, WARDEN, Respondent	)	

AMENDMENT TO WRIT OF HABEAS CORPUS PETITION

William Neal Moore being first duly sworn, identifies himself as the Petitioner in the above-styled Petition in which he seeks a (sic) amendment to a Writ of Habeas Corpus under 28 U.S.C. 2254 challenging his sentence of Death on grounds, inter alia, that it violates rights secured him by the Sixth, Eighth and Fourteenth Amendments because;

Petitioner did not receive the effective assistance of counsel in;

(A) Counsel's failure to investigate and challenge to the composition to the Grand Jury of Jefferson County.

(B) Counsel's failure to inform the petitioner that he could challenge the Grand Jury.

(C) Counsel's failure to investigate the actual prejudice of Jefferson County and to seek a change of venue.

(D) Counsel's failure to request that the closing arguments of District Attorney and his arguments concerning punishment, aggravating and mitigating circumstances be transcribed for appeal review by the Georgia Supreme Court.

(E) Unconstitutional cases used in the Direct Review by the Georgia Supreme Court in comparison of the death sentence.

INEFFECTIVE ASSISTANCE OF COUNSEL

(A) Counsel's failure to investigate and challenge to the composition to the Grand Jury of Jefferson County.

i. In the Habeas Corpus hearing in Tattnall County 'T-44'.

Q. Mr. Pierce would you tell us what you did by way or pretrial investigation or investigation into the case?

A. Well, of course, I interviewed Billy several times. I've talked with investigating officers. I saw the confession by the way which was already, it was also recorded in addition I believe to being typed out, I never heard the recorded statement. I could not find any investigation to make to. That I could find that would change what we had.

Petitioner's lawyer made no investigation of procedures in Jefferson County and had no basis in research or information upon which to evaluate a Grand Jury challenge. The conclusion that petitioner was denied the effective assistance of counsel is further warranted by the fact that the exclusion issue was being raised by other defendant being tried after the time of petitioner trial in Jefferson County, in the same year only six months later, There is no constitutionally valid excuse for counsel's default in this case.

States cannot, consistent with due process, subject a defendant to Indictment and Trial by a jury that has been selected in an arbitrary and Discriminatory manner. In violation of the Constitution and laws of the United States. Illegal and unconstitutional Grand and Jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases. And they increase the risk of actual bias as well.

Unequivocally, death cases are different both in degree and kind from all other cases. Gregg v. Georgia, 428 U.S. 153 U.S. Death cases therefore, require special scrutiny to determine that both guilt and sentence phases comply with Due Process. Gardner v. Fla. 430 U.S. 349 (1977); Smith v. Hopper, 240 Ga. 93, 94 (1977). The failure of the attorney to raise the issue of exclusion constitutes gross negligence and incompetency, and makes petitioner's death sentence unconstitutionally arbitrary. "In accord Hawes v. State, 240 Ga. 327 (1977). The failure of Petitioner's counsel to raise the issue of systematic exclusion of blacks, women, and

young people from grand and traverse juries, particularly where the excluded groups were precisely those most scrupled against the death penalty, more than demonstrates the denial of effective assistance of counsel in this case.

In Habeas Corpus hearing, T-45, Mr. Pierce stated that he knew of no witness that could have possibly changed the outcome of the case.

Q. Mr. Pierce based upon your examination of the confession and discussions with the investigating officers as well as your conferences with Mr. Moore. What if, any witnesses would there have been who may have changed, or possibly could have changed the outcome of the case had you gone to a jury?

A. I don't know of any that would have been helpful to him.

Petitioner's counsel failed to follow up in investigation after talking to the investigating officers and reading the confession because, George Curtis is spoken of as being with the petitioner during the first phase of the crime, and was older than petitioner, seeking the influence which he had on petitioner in this case, there was no interview of George Curtis by Attorney Pierce.

(B) Counsel's failure to inform the Petitioner of his rights that he could challenge the Grand Jury.

In Habeas Corpus hearing, T-48, Mr. Pierce states as to what his advice was with various constitutional aspects concerning a guilty plea.

Q. And I believe you had, said earlier that you did discuss with Mr. Moore the various constitutional aspects concerning a guilty plea.

A. I explained to him everything I could think to explain to him what his rights were, what the procedure would be or could be, and I can't think of anything I did not tell him.

Q. All right, is this your usual custom and practice?

A. Yes.

As the record shows, Mr. Pierce advice to guilty pleas in usual custom and practice does not with grand jury challenging, only the procedures of a guilty plea.

Petitioner was not informed by counsel about his constitutional rights with respect to the Grand Jury composition, nor how the Grand Jury is selected or that blacks were systematically excluded, and petitioner's attorney did not tell him that failure to challenge it would preclude him from later raising that issue.

(C) Counsel's failure to investigate the actual prejudice of Jefferson County, and after finding such prejudice to seek a change of Venue.

In the Habeas Corpus hearing, T-38.

Q. Okay Mr. Pierce, tell us briefly, how you arrived at your advice to Mr. Moore to plead guilty, considerations?

A. Well, as I say, the confession had already been given prior to the time I was, knew anything

about the case and it looked to me like it was iron clad confession, I saw no way around it. The community there was in a turmoil at that time over another vicious killing where, there was torture and so forth. And I felt like we just the best thing we could do in this case was to look for mercy and that's what we were looking for.

Now according to Mr. Pierce feeling and knowledge of the Birt case he felt that the community was still in turmoil, nevertheless, Mr. Pierce knew that District Attorney Thompson was seeking the Death Penalty for the petitioner, and the pleadings of June 4th, 1974, and trial transcript bear this out. Mr. Pierce did not challenge the Grand Jury to prove the actual prejudice, nor did he seek a motion for change of venue because he felt like the community was still in a turmoil.

Surely a challenge to the indictments, the unconstitutional Grand Jury would have given both the community time to cool off, the judge, and District Attorney also, even to provide a much better chance for the petitioner to receive the mercy of the court. And the records reflect there were no pretrial motions filed with the court.

This clearly fall within the range of ineffective assistance of counsel. In Pitts v. Glass, 231 Ga. 638, 639 (1974) the court abandoned the sham, mockery test for determining effectiveness of counsel and adopted the standard in Mackenna v. Ellis, 280 F. 2d 592 (5th Cir. 1960); "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not

errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." In accord Hawes v. State, 240 Ga. 327 (1977). The failure of petitioner's counsel to raise the issue of systematic exclusion of blacks, women, and young people from Grand and Traverse Juries, particularly where the excluded groups were precisely those most scrupled against the death penalty more than demonstrates the denial of effective counsel in this case.

In order to obtain release on federal habeas corpus under these circumstances, respondent must not only establish the unconstitutional discrimination in selection of Grand Jurors. He must also establish that his attorney's advice to plead guilty without having made inquiry into the composition of the Grand Jury rendered that advice outside the "Range of competence demanded of attorney in criminal cases." Tollett v. Henderson.

(D) Counsel's failure to request that the closing arguments of District Attorney and his own arguments concerning punishment; aggravating and mitigating circumstances be transcribed for appeal review by the Georgia Supreme Court.

There is no request in the trial transcript by petitioner's attorney to have any of the closing arguments transcribed. In Harris v. State, 237 Ga. 718, 726-27 (1976), Cert. Den. ___ U.S. ___ 97 Sup. Ct., 2642, 53 L.Ed.2d 251 (1977), " . . . If counsel wants the final arguments recorded it is his duty to see that it is done in as much as it is not required by statute . . . Counsel

cannot sit by and permit some matter they could correct by timely action and later claim error.

Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical consideration as well as specialized knowledge of the law. Brady v. U.S., 756 757, 25 L.Ed.2d.

Surely counsel specialized knowledge of the law means the Code of Georgia statutes dealing with trial court procedures in death cases as as: Georgia Code Ann. Section 6-805 and Section 27-2401 address the procedure for the preparation of a record for appeal." . . . the court reporter shall exactly and truely record, or take stenographic notes of, the testimony and proceeding in the case, except the argument of counsel." Ga. Code Ann. Section 27-2401 (Emphasis supplied).

Since petitioner's attorney set forth all of his mitigating circumstances in the closing argument for the express purpose that the reviewing court can consider them, and the ruling judge to consider them, for the mercy of the court, counsel faithful representation in the interest of his client, has as his contingency plans were in the case at the Bar.

In the Habeas Corpus Hearing, T-38, 39;

Q. Okay, now, did you ever, prior to the pronunciation of the, the pronouncement, I guess is the word, of the sentence did you, do you recall having any discussions with Mr. Moore on contingency plans, in the event the death sentence was imposed.

A. Well, the discussions we had were that we were going to take our chance with the judge, as opposed to a 12 man jury and that we were going to remain with this decision for, for appellate purposes. We felt that we would have a better chance or I did. I was consulting with Billy and explaining to him how I felt. That with one man imposing the sentence as opposed to 12 persons imposing the sentence, we'd have a better chance on appeal even if the judge in this instance, did give the death penalty.

This clearly set forth that there is no actual basis to consider this faithful representation of the interest of petitioner nor showing the specialized knowledge of the law.

(E) Unconstitutional cases used in the Direct Review by the Georgia Supreme Court in comparison of the Death Sentence.

In Furman v. Georgia the United States Supreme Court ruled that Georgia Death Penalty statutes were unconstitutional, under the George Code Ann. Title 26 on criminal Procedures, the court procedures contain only one phase of trial proceeding were the judge and/or juries determine the guilt and sentence all in one phase. This death penalty statute set forth no consideration for mitigating circumstances, which is a vital element in this phase, of pre-sentencing to deal with evidence for punishment.

All death penalty cases were overturned from 1972 and Backwards and these were some of the cases Lingo

v. State, 226 Ga. 496, 175 S.E.2d 657 (1970); Johnson v. State, 226 Ga. 511, 175 S.E.2d 779 (1971); Pass v. State, 227 Ga. 730, 182 S.E.2d 779, (1971); Watson v. State, 229 Ga. 787, 194 S.E.2d 407 (1972). Nevertheless they were used to compare to the petitioner's case.

Now according to the new death penalty ruling and statute in Gregg v. Georgia. The statute in the sentencing procedure "27-2534" Law. Ga. L. 1974, PP. 352, 357 will permit judges and juries to determine whether any mitigating and aggravating circumstances exist, and whether to recommend mercy for the defendant.

Now according to this statute and Gregg v. Georgia ruling the above cases are still unconstitutional and truly unfit for comparison to present day death penalty cases, because of the different trial proceeding and laws of the Georgia Code Ann. Title 27-2534.1.

How can the state Supreme Court compare the two different death penalty statutes and cases, where one is unconstitutional, and has been wantonly and freakishly imposed. To use the above cases to uphold the present law. There is no legal way to compare the sentencing phase of the trial, where mitigating or aggravating circumstances are brought out, because those trials and transcripts have not been recorded, and the basic direct review of the state Supreme Court is different on this count.

Nevertheless, it's the court's duty to view similar cases. Now if the cases are unconstitutional could they be similar. And the evidence compared from a legal stand point of law. Unequivolally (sic), death cases are different both in degree, and kind from all other cases.

The above are not death cases any more nor are they legal or constitutional death cases according to Furnam v. Georgia and Gregg v. Georgia, death cases require special scruting (sic) to determine that both guilt and sentence phase comply with Due Process of law.

Since the above cases do not meet the statutory provisions designed by the Georgia Legislature to meet the objections of Furman and Jackson, nor any of the pre-Furman cases, and it's the duty of the Georgia Supreme Court under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the State the death penalty has been imposed generally. Then why are there no guilt pleas in comparsion. Two phase trial of guilt and sentencing, a Direct review to state Supreme Court to consider mitigating and aggravating circumstances.

CONCLUSION

This court should grant a amendment for Writ of Habeas Corpus and petitioner pray a hearing is heard in this case and remand it with directions that the sentence of death be set aside and a life sentence imposed or afford the petitioner any further relief that justice requires.

/s/ William N. Moore
William Neal Moore
Petitioner Pro se

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of March, 1979 I mailed first class a copy of the attached Amendment to Writ of Habeas Corpus, with copies to Attorney General Arthur K. Bolton and Assistant Attorney General John

Dunsmore, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

/s/ William N. Moore
William Neal Moore
Petitioner Pro se
P.O. Box 70234 - 4th Floor
State Prison
Reidsville, GA 30453

Prisoner's Name: WILLIAM NEAL MOORE

Prison Number: D-103403

Place of Confinement: Georgia Diagnostic and Classification Center, Jackson, Georgia.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

WILLIAM NEAL MOORE, Petitioner,
vs.
WALTER D. ZANT, Warden, Respondent.
Civ. Action No.

~~AMENDED~~ PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(1) The name and location of the court which entered the judgment of conviction and sentence under attack are:

The Superior Court of Jefferson County,
Jefferson County Georgia.

(2) The date of the judgment of conviction and sentence is July 17, 1974.

(3) The sentence is that petitioner be put to death by electrocution.

(4) The nature of the offense involved is that the petitioner was convicted of the offense of murder while engaged in the commission of another capital felony, to wit, armed robbery, in violation of Ga. Code Ann. §27-2534.1(b)(2).

(5) The petitioner entered a plea of guilty to the offense charged.

(6) There was no trial as to the issue of guilt or innocence. The sentencing hearing was had before the court without intervention of a jury.

(7) The petitioner made statements to the court during the entry of the guilty plea, and the petitioner testified during the sentencing hearing before the court.

(8) The petitioner appealed his conviction and sentence of death.

PROCEDURAL HISTORY

(9) The facts of the petitioner's appeal are as follows:

(a) The Supreme Court of Georgia affirmed the petitioner's conviction and sentence in a *per curiam* opinion, with one justice dissenting, on February 12, 1975; on March 4, 1975, that Court denied a timely petition for rehearing. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975).

(b) On July 6, 1976, the Supreme Court of the United States denied a timely petition for a writ of certiorari. *Moore v. Georgia*, 428 U.S. 910 (1976). (Justices Brennan and Marshall were of the opinion that certiorari should be granted.) On October 4, 1976, the Supreme Court denied a timely petition for rehearing. *Moore v. Georgia*, 429 U.S. 873 (1976).

(10) Other than the appeal described in paragraphs 8 and 9 above, the only petitions, applications, motions, or proceedings filed or maintained by the petitioner with respect to the 1974 conviction and sentence

of the Superior Court of Jefferson County are those described in paragraph 11 below.

(11) (a) On October 18, 1976, the petitioner filed an action for a declaratory judgment in the Jefferson County Superior Court seeking a new sentencing proceeding. Relief was denied without a hearing, and that order was affirmed by the Georgia Supreme Court. *Moore v. State*, 239 Ga. 67, 235 S.E.2d (1977). On October 3, 1977, the Supreme Court of the United States denied a timely petition for writ of certiorari. 434 U.S. 878 (1977).

(b) On January 6, 1978, the petitioner filed a motion to withdraw the plea of guilty. The motion was denied without a hearing, and the appeal was not perfected when the Supreme Court of Georgia declined to grant a stay of execution.

(c) In January of 1978, James C. Bonner, then counsel for the petitioner, filed a petition for writ of habeas corpus in the Superior Court of Tattnall County; a hearing was held on March 30, 1978, and on July 13, 1978, the court denied all relief sought. On October 17, 1978, the Supreme Court of Georgia denied an application for a certificate of probable cause to appeal from the denial of habeas relief by the trial court.

(d) On August 18, 1978, James C. Bonner, then counsel for the petitioner, filed a petition for writ of habeas corpus and application for stay of execution in the United States District Court for the Southern District of Georgia. *Moore v. Balkcom*, Civ. No. 78-224. That action was voluntarily dismissed without prejudice on August 28, 1978, after the Supreme Court of

Georgia granted petitioner a stay of execution. Subsequently, petitioner's execution date was set for December 4, 1978.

(e) On November 22, 1978, counsel for petitioner refiled a petition for writ of habeas corpus (Appendix C)* and application for stay of execution before the United States District Court for the Southern District of Georgia. The stay was granted. On March 6, 1979, petitioner Billy Moore himself filed a *pro se* amendment to the petition for writ of habeas corpus adding additional grounds for relief. (Appendix D)* The United States Magistrate held a hearing on the original petition on June 18, 1979.

(f) On September 15, 1980, respondent filed a motion for final disposition in this matter.

(g) On September 30, 1980, petitioner retained H. Diana Hicks of Nashville, Tennessee to serve as his counsel without compensation, and dismissed James C. Bonner.

(h) On October 1, 1980, Hicks moved to file an amended petition for habeas corpus to supplant the original petition and the *pro se* amendments. (Appendix E)* The amended petition did not raise ineffective assistance of counsel but did raise additional claims for which state remedies had been exhausted. Counsel requested an evidentiary hearing on the amended petition. Counsel also filed a Memorandum in Opposition to Respondent's Motion for Final Disposition.

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(i) In January of 1981, Ms. Hicks informed petitioner that she was leaving her position with the Southern Prisoners Defense Committee in Nashville, Tennessee and reentering private practice in another state and could not continue to represent him. She exchanged many letters with petitioner regarding her move and the need for new counsel to enter the case. On April 8, 1981, petitioner met with Mr. Givelber and retained him to represent him in this matter.

(j) On April 29, 1981, this Court granted petitioner habeas corpus relief from his sentence of death while denying him relief from his conviction. This Court also denied leave to file both the April 6, 1979 and October 1, 1980 amendments to the petition for habeas corpus.

(k) On June 23, 1983, the United States Court of Appeals for the Eleventh Circuit affirmed the grant of relief as to petitioner's sentence. *Moore v. Balkcom*, 709 F.2d 1353 (11th Cir. 1983). On September 30, 1983, the Court withdrew its earlier opinion and denied relief as to petitioner's sentence. 722 F.2d 629 (11th Cir. 1983).

(l) On December 13, 1983, the Court of Appeals denied petitioner's motion for rehearing and suggestion for rehearing en banc. 722 F.2d 629 (11th Cir. 1983).

(m) On March 5, 1984, the United States Supreme Court denied the petition for writ of certiorari. *Moore v. Balkcom*, ___ U.S. ___, 79 L.Ed.2d 773 (1984).

(n) On May 8, 1984, the Superior Court of Jefferson County denied petitioner's request for leave to appear before the court, and set May 24, 1984 as an execution date.

(o) On May 11, 1984, petitioner filed a habeas corpus petition (App F) with the Superior Court of Butts County which denied it on May 17, 1984. The Georgia Supreme Court denied relief.*

STATEMENT RESPECTING RULE 9(b)

(12) The present petition presents nine new and different grounds for relief, none of which have been previously adjudicated on their merits by this Court. Four of these claims are put forward in the present petition, and not previously, because they depend upon changes in law announced only subsequent to the filing of petitioner's state and federal habeas corpus petitions in 1978. A fifth claim depends on the independent development, since 1978, of facts that make out a constitutional violation. Three claims were presented to this Court by petitioner's former attorney Diana Hicks, in her October 1, 1980 proposed amendment to the petition. The Court, in its discretion, did not permit amendment of the petition to include these claims – since it granted relief on other grounds – and thus it never addressed or decided the merits of any of these claims. The ninth claim was not present previously because of conflicts between petitioner and his state

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habeas corpus counsel, and because of the unfamiliarity of that counsel with relevant facts and legal principles. Each of these claims will be addressed in turn.

(13) The *Estelle v. Smith* claim, ¶¶ 26-31 *infra*, depends upon legal principles first announced by the Supreme Court in *Estelle v. Smith*, 451 U.S. 454 (1981) on May 18, 1981, nearly three years after petitioner's federal habeas corpus petition was filed.

(14) The *Lockett v. Ohio* and *Eddings v. Oklahoma* claim, ¶¶ 32-38 *infra*, depends upon legal principles first adverted to in *Lockett v. Ohio*, 438 U.S. 586 (1978) on July 3, 1978, seven months after petitioner's state habeas corpus proceedings were begun, and just 10 days before the state habeas court denied relief. Those principles were not full developed until the Supreme Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982) on January 19, 1982.

(15) The *Proffitt v. Wainwright* claim, ¶¶ 43-44 *infra*, depends upon legal principles first announced by the Court of Appeals in *Proffitt v. Wainwright*, 685 F.2d 1227 (1982), reh. denied, 706 F.2d 311 (11th Cir. 1983), which was decided on September 10, 1982.

(16) The *Zant v. Stephens* claim, ¶¶ 45-46 *infra*, depends upon law that was only fully developed in *Zant v. Stephens*, ___ U.S. ___, 77 L.Ed.2d 235 (1983), announced on June 22, 1983.

(17) The *Enmund v. Florida* claim, ¶¶ 47-49 *infra*, depends upon a legal principle first announced by the

Supreme Court in *Enmund v. Florida*, 458 U.S. 782 (1982) on July 3, 1982.

(18) The *McCleskey v. Zant* claim, ¶¶ 50-56 *infra*, depends upon social scientific evidence that was developed by researchers working independently of petitioner Moore during the period from 1979 to 1983; it was unavailable to him as an indigent in 1978 at the time of his initial state and federal habeas corpus proceedings. The evidence was first presented in any state or federal court in any form only in June of 1982.

(19) Three of the claims, see ¶¶ 39-42, 71-76 *infra*, were presented by petitioner to this Court in the October 1, 1980 proposed amendment, while the federal petition was still in this Court.

(20) Despite requests from petitioner, Bonner refused to raise the claim in state habeas corpus proceedings that petitioner's initial counsel, Hinton Pierce, rendered ineffective assistance in the advice rendered to and representation provided for petitoner. Mr. Bonner was unaware that petitioner enjoyed an independent Sixth Amendment right to effective representation at the penalty phase of a capital case. His failure to raise the claim was attributable to his lack of awareness of this legal option. Moreover, the Prisoners' Legal Counseling Project with which Mr. Bonner was associated, lacked any resources with which to do any factual investigation. He conducted no factual inquiry of any kind into the adequacy of Mr. Pierce's investigation of the circumstances surrounding his representation of petitioner. Mr. Bonner did not inquire about the possible availability of witnesses from the community

in which the crime occurred, the army base at which petitioner was stationed, or people who knew petitoner and his circumstances, in order to determine whether evidence could have been presented sheddling light on the circumstances surrounding petitioner's crime, community sentiment regarding that crime, community attitudes toward petitioner, petitioner's military record or circumstances in petitioner's life which might have been considered in mitigation at petitioner's sentencing hearing. (See Bonner Affidavit, *infra*. Appendix I*)

(21) The state habeas court denied each of petitioner's claims and *sua sponte* determined that the advice rendered by Pierce as to whether petitioner should stand by his plea even in the event that he was sentenced to death constituted the effective assistance of counsel. The state habeas court also found that petitioner's counsel had been shown a copy of the presentence report.

(22) On March 12, 1979, Bonner filed a petition with this Court to be relieved of his obligation as lead counsel because he and his project could no longer effectively represent petitioner and could not assure that petitioner's right to collateral review would not be prejudiced.

(23) On April 6, prior to any hearing in this matter, petitioner filed a *pro se* amendment to his petition for habeas corpus raising, as additional grounds for relief, ineffective assistance of counsel in that Pierce:

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(a) failed to investigate and challenge the composition of the grand jury or to inform petitioner of this right; (b) failed to investigate prejudice in Jefferson County and seek a change of venue; and (c) failed to request that closing arguments be recorded. Petitioner also challenged the use of pre-*Furman* death cases for comparability review. Leave to amend was granted.

(24) On September 30, 1980, petitioner retained H. Diana Hicks of Nashville, Tennessee to serve as his counsel without compensation and dismissed James C. Bonner.

(25) On October 1, 1980, new volunteer counsel Hicks moved to file an amended petition for habeas corpus to supplant the original petition. The amended petition did not raise ineffective assistance of counsel only because it had not at that time been fully exhausted.

A. *The Estelle v. Smith Claim*

(26) The failure of the state to inform petitioner of his right to remain silent and of his right to counsel – or to secure any knowing and intelligent waiver of those rights – prior to interrogating him, while he was in custody, for purposes of gathering information relevant to sentencing, violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Facts Supporting Petitioner's Claim That He Was Advised Neither Of His Right To Remain Silent Nor Of His Right To Counsel Prior To Or During The Presentence Interview Conducted While He Was In Custody Awaiting Sentencing

(i) *The Fifth Amendment Claim*

(27) Following petitioner's guilty plea, and while he was incarcerated and awaiting sentence, petitioner was interrogated by J. Clark Rachels, Probation and Parole Supervisor, an employee of the State of Georgia. The purpose of the interrogation was to gather information for the use of the court in imposing sentence. The interrogation took place in the Jefferson County Jail in the absence of counsel. Petitioner was never informed that he had the right to remain silent and that the information he gave could be used to decide whether he should be sentenced to death.

(28) In 1981, the Supreme Court of the United States held that the Fifth Amendment protection against self-incrimination applies to the penalty phase of a capital trial. *Estelle v. Smith*, 451 U.S. 454 (1981). *Smith* makes clear that the Fifth Amendment right to remain silent and not to answer questions, and to counsel's assistance, is applicable to state investigations in preparation for a capital sentencing proceedings in the same manner as to investigations in preparation for a trial on guilt or innocence. Because petitioner Moore was never informed of his right to remain silent or to a lawyer's assistance, he was deprived of these rights secured by *Estelle v. Smith, supra*, which are fully retroactive. *Battie v. Estelle*, 655 F.2d 692, 696-99 (5th Cir. 1981). Moreover, since petitioner was not informed of these rights, he did not waive them. Petitioner's Affidavit setting forth these facts is annexed.

(29) The presentence report, based in part upon the unconstitutional interrogation, contained many

highly prejudicial errors and omissions, more fully set forth below. On information and belief, the sentencing court consulted the presentence report in determining the appropriate sentence and in preparing the sentencing court's report to the Georgia Supreme Court.

(ii) *The Sixth Amendment Claim*

(30) The failure to inform petitioner of his right to consult with counsel in preparation for and during the course of his custodial interrogation while awaiting sentencing, and the conduct of that interrogation in the absence of counsel, violated his rights under the Sixth and Fourteenth Amendments.

(31) The pre-sentence interrogation of petitioner described above occurred at a critical stage in the proceedings against him. The Supreme Court established in *Estelle v. Smith* that a capital defendant interviewed by a court-appointed official while awaiting sentencing has a separate, Sixth Amendment right to counsel. Petitioner was never informed of this right to consult with counsel prior to the interrogation or of his right to have counsel present. He was deprived of *Smith*'s guarantee. Because the presentence report, prepared on the basis of the interview, was pervaded with errors and inaccuracies, and because petitioner had no guilt trial, and therefore no opportunity fully to present the individual circumstances of his case to the Court, the denial of his right to the assistance of counsel was particularly prejudicial. Since he was not informed of these rights, petitioner did not intelligently and voluntarily waive them. *See* Petitioner's Affidavit, *infra*,

Appendix J*

B. *The Lockett v. Ohio and Eddings v. Oklahoma Claim*

(32) Petitioner's sentence was based on a presentence report which did not present the sentencer with an accurate picture of petitioner, his history, his current situation, his "criminal" record, or the circumstances of the crime. These pervasive errors deprived petitioner of his right, guaranteed by the Fifth, Eighth and Fourteenth Amendments, to be sentenced to death on the basis of accurate information, including information about his character and all relevant mitigating circumstances surrounding the crime.

Facts Supporting Petitioner's Claim That He Was Sentenced On The Basis Of Materially False and Misleading Information Contained In The Presentence Report

(33) The accurate information which *should* have been before Judge McMillan for purposes of sentencing, but which was obscured because of the errors that pervaded the report, is set forth in Appendix K.* The major omissions and materially false statements in the presentence report Appendix L* are noted below.

(34) The presentence report prominently displayed, under a heading "Record of Previous Offenses," ten separate crimes. Yet six of these were mere arrests, not involving adjudications of any kind. The four listed offenses which actually involved juvenile court

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adjudications were all imposed in proceedings in which petitioner had not been afforded either the right to counsel or the right to confrontation or cross-examination of witnesses. These adjudications were all unconstitutional under the landmark cases of *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *In re Gault*, 387 U.S. 1 (1967). *See* Petitioner's Affidavit, *infra*.

(35) The presentence report also stated that petitioner had no marital problems and failed to suggest that he was suffering from any emotional stress prior to or during the crime. In fact, petitioner was suffering from severe marital and financial problems, and so advised the probation officer. *See* Petitioner's Affidavit, *infra*. Petitioner had been in great emotional turmoil and was in desperate need of funds immediately prior to his crime because his wife had refused to join him in Georgia and instead remained in Columbus, Ohio where she left him for another man and led a dissolute life. As a result she stopped providing any care whatsoever for petitioner's infant son and petitioner was forced to leave his hospital bed (where he was recuperating from surgery) to go to Columbus and get his child and bring him back to Georgia. Petitioner had been living on the base to save money since he had allotted the great bulk of his pay to his wife for the care of their child. However, petitioner's request to change the allotment was snarled in military bureaucracy with the result that he was without funds to care for his son. He was in the process of securing a $250 emergency loan from the Red Cross at Fort Gorden when he was arrested. None of this appears in the presentence report.

(36) The presentence report asserts that petitioner claimed that he and another man, the nephew of the victim, attempted to rob the victim on a number of occasions but "every time" the nephew got drunk, suggesting that the two had planned and attempted the robbery over a period of time. In fact, petitioner had never planned or attempted to rob the victim; it was a drunken, spontaneous act on the evening of the crime. As petitioner informed the probation officer, he was extremely drunk on the night of April 2, was led to the house by the nephew of the victim and returned later that same evening, when the crime occurred. *See* Petitioner's Affidavit, *infra*; Factual Background, *infra*.

(37) The presentence report also stated that petitioner first fired at the victim, who then fired back. However, every account of the crime given by petitioner reveals that he fired his pistol through a door into a dark room in a panicked and drunken *response* to an initial shotgun blast by the victim. *Id.*

(38) The presentence report was also prejudicial, incomplete and misleading on petitioner's military record. The "Community Attitudes" section of the report suggested that those who knew petitioner while at Fort Gordon had nothing either positive or negative to say about him. This was false and misleading, since many people at Fort Gordon could and would have attested to petitioner's good character and had requested the investigator to contact them. Petitioner's Affidavit, *infra*; Factual Background, *infra*. Summarized in the Factual Background Appendix is the testimony on petitioner's character by petitioner's fellow soldiers at a proceeding to determine whether he should be dishonorably discharged. As that testimony

demonstrates, petitioner's military record was excellent. He was viewed as an "outstanding" soldier and a fine leader of men.

C. *The Gardner v. Florida Claim*

(39) The trial judge imposed the sentence of death based in part upon a pre-sentence report that neither petitioner nor his counsel had been afforded any meaningful opportunity to review, correct or supplement, in violation of petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

Facts Supporting Petitioner's Claim That His Sentence Was Imposed Based Upon An Undisclosed Presentence Report

(40) After petitioner's guilty, plea, the trial court ordered a presentencing sentencing investigation to be conducted; pursuant to that order, the Department of Offender Rehabilitation Community-based Services prepared a Case Study concerning petitioner which was dated and submitted to the sentencing judge on July 17, 1974. The entire report, including enclosures, is seventy-two pages long; the first five pages are the Case Study prepared by the probation officer. The Case Study contains representations about petitioner as well as his supposed "Record of Previous Offenses."

(41) The presentence report was not disclosed to petitioner prior to sentencing.

(42) The presentence report was never disclosed to petitioner's counsel prior to sentencing under circumstances which made it possible for counsel or petitioner to undertake a constitutionally adequate review

of the material contained therein and to correct its errors and make up for its omissions. At most, it was shown to petitioner's counsel just prior to its introduction into evidence by the State on the day of the sentencing hearing, at a time when no careful examination, much less any out-of-court investigation, could have been undertaken.

D. *The Proffitt v. Wainwright Claim*

(43) The information concerning petitioner was contained in a presentence report that was presented to the trial court in a written document rather than in open court, by witnesses under oath and subject to cross-examination, in violation of petitioner' rights to confrontation and cross-examination, guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

Facts Supporting Petitioner's Claim That He Was Deprived Of His Right To Confront Information and Witnesses Presented In The Presentence Report

(44) Under *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 182), *mod.* 706 F.2d 311 (1983), *cert. denied*, ___ U.S. ___, a capital defendant has the specific right to confront witnesses whose statements, whether in court or out of court, are used against him. *Id.* at 1254. The false and misleading information which was contained in the presentence report was not represented in open court, by witnesses under oath and subject to cross-examination. This deprived petitioner of notice of the nature of the information, the opportunity to challange it, by the cross-examination of witnesses under oath, and of the opportunity to supplement and correct the incomplete and false picture it presented. The

deprivation of petitioner's vital Sixth Amendment rights to confrontation and cross-examination compounded the unconstitutional inaccuracies in the presentence report itself. Had petitioner been given an adequate opportunity to confront the witnesses relied upon in the report itself, he could have corrected the misimpressions about his financial, military and marital circumstances, clarified the circumstances of the crime, and presented the truth about his prior juvenile record. *See* Factual Background, *infra*.

E. *The Zant v. Stephens Claim*

(45) The errors and omissions contained in the presentence report and which were repeated in the report of the trial court deprived petitioner of his Eighth and Fourteenth Amendment right to accurate and meaningful appellate review.

Facts Supporting Petitioner's Claim That He Was Denied A Meaningful Appellate Review Of His Death Sentence

(46) The errors and omissions contained in the presentence report were transmitted to the Georgia Supreme Court as part of the record of this case. Some (particularly regarding his prior record) were repeated in the report of the trial court. The efforts of the Georgia Supreme Court to conduct its independent and meaningful appellate review were therefore hindered by a lack of complete and accurate information concerning petitioner. Petitioner was therefore denied his right, guaranteed by *Zant v. Stephens*, ___ U.S. ___, 103 S.Ct. 2733 (1983), to a meaningful appellate review,

based on accurate information, of his death sentence. *See Zant v. Stephens*, 456 U.S. 410, 413 (1982).

F. *The Enmund v. Florida Claim*

(47) Petitioner's death sentence is excessive and disproportionate under the Eighth and Fourteenth Amendments, since it was imposed despite his repeated and uncontradicted denial of any intent to kill the victim.

Facts Supporting Petitioner's Claim That His Offense Does Not Involve Intentional Killing

(48) Petitioner repeatedly denied that he had any intent to kill the victim. He told the police, and repeated in open court, that he fired only after the victim fired first, and that he fired out of a combination of fright and intoxication, not out of calculation or malice.

(49) Nothing in the record contradicted petitioner's statement. It was consistent with the physical evidence which showed that a shotgun blast had been fired in petitioner's direction. It was consistent with the police investigation which showed that petitioner had been drinking. Petitioner consistently told the same story from arrest through the sentencing hearing. The imposition of the death penalty in his violates the "fundamental" requirement "that causing harm intentionally must be punished more severely than causing the same harm unintentionally." *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

G. *The McCleskey v. Zant Claim*

(50) Petitioner is an indigent black man convicted of the murder of a black male. He was sentenced to die

and will be executed arbitrarily pursuant to a pattern and practice of Georgia prosecuting authorities, courts, juries, and Governors to discriminate - on grounds of race of both the victim and the defendant - in the administration of capital punishment, in violation of petitioner's rights secured by the Eighth Amendment and by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. These issues are currently pending before the United States Court of Appeals, in *Spencer v. Zant*, 715 F.2d 1562, *vacated for rehearing en banc*, 715 F.2d 1583 (1983); *McCleskey v. Zant*, No. 84-8176 (to be argued June, 1984) and *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983), *vacated for rehearing en banc*, 729 F.2d 1293 (11th Cir. 1984).

Facts Supporting Petitioner's Claim Of Arbitrariness and Racial Discrimination

(51) Petitioner is an indigent black man. At the time of his 1978 habeas hearing, petitioner did not have available the type of social scientific evidence on arbitrariness and racial discrimination in the administration of the death penalty in Georgia, and in Jefferson County, where he was sentenced, which is now available to him. Because petitioner is indigent, he has been forced throughout to rely upon the volunteer services of his lawyers and upon empirical evidence devloped by social scientists working independently of his particular case.

(52) Subsequent to petitioner's prior habeas proceeding, two empirical studies were conducted from 1979 through 1982 considering the question of whether

the substantial racial disparities observed in Georgia's capital sentencing system persist even when a host of legally valid and relevant factors are taken into account: the Procedural Reform Study and the Charging and Sentencing Study. These two empirical studies were conducted by Professor David Baldus and his colleagues.

(53) In August, 1983, and in October, 1983, evidentiary hearings on these empirical studies were conducted by the United States District Court for the Northern District of Georgia, in McCleskey v. Zant, No. 81-2434A (N.D. Ga.)

(54) In those evidentiary hearings held in *McCleskey V. Zant,* the studies and conclusions of Professor Baldus and his associates were introduced into evidence. These expert witnesses concluded that significant racial desparties persist even if one controls for the presence or absence of Georgia's statutory aggravating circumstances.The disparities based upon the race of the victim remain strong when a host of other legitimate aggravating and mitigating factors are taken into account, and even when the focus of the study is narrowed from the universe of cases of indictments for murder to those cases in which a murder conviction is obtained, or those in which a penalty trial is held.

(55) On February 2, 1984, the District Court in *McCleskey v. Zant,* entered a final order in which it rejected these contentions regarding the arbitrariness and racial discrimination of the administration of Georgia's death penalty scheme. *McCleskey v. Zant,* 580 F. Supp. 338 (N.D. Ga. 1984). By order of the Eleventh

Circuit Court of Appeals entered on March 28, 1984, that Court on its own motion determined to hear the *McCleskey* appeal *en banc* without any prior consideration of the appeal by a panel of that Court. A copy of the *en banc* brief submitted in that case is attached as Appendix G. The Eleventh Circuit Court will hear oral argument, *en banc,* on June 12, 1984.

(56) Petitioner alleges and adopts the documentary testimonial evidence set forward in *McClesky v. Zant.* Moreover, he alleges that racial discrimination in capital sentencing is part of a pattern of racial discrimination that characterized Jefferson County, Georgia until the recent past. This racial discrimination affected many areas of the public life in Jefferson County, including education, housing, employment, voting and the criminal justice system. Petitioner's death sentence was imposed pursuant to a pattern of intention racial discrimination in Jefferson County and the Middle Judicial Circuit.

H. *Petitioner's Ineffective Assistance At Sentencing Claim*

(57) Trial counsel's (i) failure adequately to investigate and present to the trial court possible mitigating defenses and evidence, including details of petitioner's childhood, his juvenile record, his military record, and the circumstances of the crime which were readily available to him upon investigation and (ii) failure to obtain or review, the presentence report upon which the State based its sentencing case, or to correct its many

detrimental errors and misstatements and (iii) his failure otherwise to afford effective representation to petitioner at the sentencing phase of his capital trial, violated petitioner's right to effective assistance of counsel under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts Supporting Petitioner's Claim That He Was Deprived Of The Effective Assistance Of Counsel

(58) Petitioner's attorney, Mr. Hinton Pierce (hereafter "Pierce") was retained shortly after petitioner's arrest. On April 8, 1974, four days after petitioner's arrest, Pierce wrote to the District Attorney for Jefferson County offering to plead petitioner guilty. Although the District Attorney insisted that he was going to seek the penalty of death, petitioner's attorney nonetheless advised petitioner to plead guilty and to stand by his guilty plea in the event that the judge imposed the sentence of death.

(59) On information and belief, Mr. Pierce conducted no investigation whatsoever beyond speaking with petitioner and reading a copy of his confession. Although he knew petitioner had been drinking steadily for a number of hours prior to the killing, and although intoxication can negate the specific intent required for robbery and malice murder, Mr. Pierce spoke with no one who had been with petitioner prior to the murder nor with George Curtis, the nephew of the victim who had suggested and attempted to execute the crime. He failed to do so although the police had spoken

with all these people and their names would have been available to counsel.

(60) Mr. Pierce did not file a motion to suppress the evidence seized from Moore's home or Moore's confession although (1) the warrant for petitioner's arrest was invalid on its face under *Giordenello v. United States,* 357 U.S. 480 (1958), since neither it nor the affidavit supporting it set forth facts which would permit a magistrate to conclude that probable cause existed; (2) the warrant was also invalid under *Connally v. Georgia,* 429 U.S. 245 (1977), since the justice of the peace who issued it was compensated only when she issued warrants and not otherwise; 93) both Georgia Law 27 Ga. Code Ann. 205, 207 and the United States Constitution, *Payton v. New York,* 445 U.S. 573 (1980), demand a valid warrant before an arrest can occur, as this one did, in a person's home; (4) in any event, the police lacked probable cause to arrest petitioner since the only source of information about petitioner was George Curtis, himself a suspect who fit the description of a man seen near the victim's home, and Curtis could only inform the police that petitioner was in Wrens on the evening of the killing but did not assert that he knew that petitioner had committed the crime; (5) given the illegality of petitioner's arrest, both the consent to search and waiver of petitioner's Fifth Amendment rights attributed to petitioner were invalid as fruits of the poisonous tree under *Wong Sun v. United States,* 371 U.S. 471 (1963). Mr. Pierce did not secure petitioner's consent for his decision to forego petitioner's Fourth and Fifth Amendment challenges.

(61) On information and belief, although Mr. Pierce believed that the community was so inflamed by a recent murder the petitioner stood "no chance" with a jury, Mr. Pierce neither: (1) moved for a change of venue for petitioner's trial, nor (2) sought a continuance for petitioner's sentencing, nor (3) asked the judge to recuse himself in favor of a judge from another county who would be less likely to be influenced by the passions exant in Jefferson County, nor (4) challenged the grand jury for possible bias in light of the inflamed community sentiment. Mr. Pierce neither explained any of these options to petitioner nor sought his agreement to forego such motions.

(62) Although Mr. Pierce knew or should have known that grand juries were selected in Jefferson County in a manner that discriminated against blacks, women, poor people and young people, on information and belief Mr. Pierce neither investigated the possibility of a challenge to the composition of the grand jury nor mounted such a challenge. Mr. Pierce neither explained to petitioner his right to a constitutionally selected grand jury nor did he secure petitioner's consent for foregoing an attack on the grand jury.

(63) On information and belief, although Mr. Pierce asserted that filing the pre-trial motions available to petitioner might make the law enforcement authorities and District Attorney "mad" at him and petitioner, he did not explain how their anger could lead them to do any worse than ask for the death penalty, a course to which the District Attorney was already committed. Mr. Pierce did not explain to petitioner that filing the various motions described above

might result in either the suppression of the evidence and convession which incriminated petitioner or provide the District Attorney with an incentive to plea bargain in return for petitioner's not filing the motions or withdrawing them once filed.

(64) Following petitioner's plea of guilty, Mr. Pierce failed to conduct a basic, minimum investigation or to prepare an adequate sentencing defense. On information and belief, Mr. Pierce new that petitioner had recently been under extreme emotional stress. Letters from family friends suggested that petitioner must have been under great stress to commit the crime charged. Petitioner's sister informed Pierce that people who knew petitioner at Fort Gordon were upset greatly by the news of petitioner's arrest and expressed disbelief. Petitioner had just been released after a long confinement in a military hospital; he was separated from his wife and was trying to provide for his three year old child, alone, and without any income (his military pay was being sent directly to his wife). However, on information and belief, Mr. Pierce made no effort to interview either pertitioner's (sic) estranged wife, the people who knew petitioner at the base, or the hospital staff who had treated petitioner. Nor did Pierce request that petitioner be given a psychiatric examination.

(65) Mr. Pierce took no role in developing evidence in mitigation beyond transmitting letters from family friends to the Probation Officer. On information and belief, he did not transmit two vital letters; one, from petitioner's sister which set forth petitioner's domestic troubles and another, from petitioner's physician,

which spoke very favorably about petitioner's character. If he did transmit the letters, he never insured that they came to the attention of the court as they were not contained in the presentence report.

(66) Assuming that he was, in fact, shown the presentence report prior to sentencing, on information and belief Mr. Pierce did not examine a copy of the presentence report nor did he show it to petitioner. As a result, none of the errors or omissions were corrected and petitioner was sentenced based on information which he had no opportunity to confront and which contained material inaccuracies.

(67) Mr. Pierce failed to prepare any of the witnesses who testified on petitioner's behalf at the sentencing hearing. Nor did he ask any of them a single question. Pierce failed to secure any witnesses other than petitioner's family to testify. Although Mr. Pierce was aware of mitigating circumstances, he failed to develop these circumstances by asking either petitioner or his family a single question concerning them. Moreover, he failed to clarity petitioner's ambiguous statement thus leaving it open to the false interpretation that petitioner had planned to kill Stapleton. Although petitioner testified that he was intoxicated when he entered Stapleton's house, Mr. Pierce failed to determine on direct examination how much petitioner had had to drink, or his level of intoxication.

(68) Although Pierce submitted to the probation officer a letter from a family friend alleging that petitioner's father had been in a hospital for the criminally

insane, and although the judge specifically asked petitioner's brother about this, Pierce made no effort to correct, clarify or rely upon this point.

(69) Mr. Pierce failed to preserve petitioner's rights for appeal from his death sentence in the following ways: (i) he failed to challenge the admissibility of the evidence or confession or the composition of the grand jury; (ii) he failed to object to or correct the inaccuracies contained in the pre-sentencing report either at the sentencing hearing or by a supplemental memorandum; (iii) and he failed to object to the District Attorney's final argument or ask that it be recorded.

(70) The trial judge was required to complete a report identifying the aggravating and mitigating circumstances for use by the Georgia Supreme Court in the mandatory review of the death sentence. The trial judge's report in the instant case was inaccurate and incomplete, reflecting the pre-sentence report upon which it and the sentence was based. Although the trial judge sent a copy of the report to Mr. Pierce, he failed to object to the inaccuracies or request that the report be corrected.

I. *The Imposition of Petitioner's Death Sentence*

(71) Petitioner's sentence of death was imposed by a trial court that took less than full responsibility for its sentencing decision, explicitly relying on the prospect of appellate review or Supreme Court invalidation of Georgia's capital statutes, in violation of petitioner's rights under the Eighth and Fourteenth Amendments.

Facts Supporting Petitioner's Claim Concerning The Trial Court's Imposition Of Sentence

(72) The trial court took less than full responsibility for his sentencing decision, and attached diminished consequences to the sentence of death that he imposed, because he believed, first, that the Supreme Court of Georgia would review his sentence with an eye to "even handed justice" and second, that the United States Supreme Court would find that Georgia's new death penalty statute was unconstitutional, preventing the petitioner's execution.

(73) During the presentence hearing, the court expressedly stated:

> The law provides, however, that in all death penalty cases, the case is automatically appealed to the Supreme Court of Georgia, and of course this case will be . . . they will apply "even handed justice" to your case with other cases that have happened in Georgia. Now I can't make that determination. The law does not place that discretion in me. It places that discretion solely within the jurisdiction of the Supreme Court of Georgia. As to whether or not that applies in your case is for them to decide. (Tr. T. 55-56.)

(74) The court also stated:

> You do have the hope that the Supreme Court of Georgia will reduce this to life imprisonment, and there is the hope that the Supreme Court of the United States will void all electrocution cases, but it is not for me to say. . . . I doubt's as to whether an execution will ever take place in this country again. (Tr. T. 58.)

J. *The Trial Judge's Erroneous Report*

(75) The sentence against the petitioner is unconstitutional because the trial judge's report contained incomplete and inaccurate information, which was not based on the evidence, in violation of the Eighth and Fourteenth Amendments and thus precluded the meaningful and effective appellate review required by the Eighth Amendment.

Facts Supporting Petitioner's Claim That The Trial Judge's Report Was Inaccurate, Precluding Constitutionally Required Appellate Review

(76) The trial judge is required to complete a form ("Report of Trial Judge") to indicate the aggravating and mitigating circumstances to the Georgia Supreme Court. The trial judge's report in the instant case was incomplete and inaccurate. Among other errors:

(i) The judge stated that "[t]he crime had been planned well in advance of the time committed: and, on another occasion the defendant had entered the house of the deceased and was not completed. The defendant returned again on the date that the robbery and murder occurred. In other words, this crime had been planned for sometime prior to its execution."

The evidence did not show that the crime had been planned well in advance of its execution; to the contrary, petitioner testified that the robbery was planned the evening it took place.

Although the report implied that petitioner's previous trip to Stapleton's house occurred on a different date, petitioner's testimony indicated that the first

break-in occurred only a few hours before the crime was committed. Only the inaccurate presentence report supported the judge's view.

(ii) The form specifically identified seven possible mitigating circumstances. The judge failed to indicate that there was evidence of three of these mitigating circumstances: (1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, (2) the murder was committed under circumstances which the defendant believed to provide a moral justiciation or extenuation for his conduct, (3) at the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of intoxication.

(iii) The form requested that other mitigating factors be identified. The judge failed to indicate that there was evidence that Stapleton fired the first shot, and that petitioner had not intended to kill Stapleton but got frightened and fired back.

The Georgia Supreme Court was unable to compare this case in a meaningful way to any other case, or to determine whether the sentence was arbitrary, because of the inaccuracies contained in the trial judge's report.

(77) Each of the grounds listed in paragraphs (26) through (76) has been presented to the Georgia courts, and each has been rejected by the Georgia courts.

(78) There are no petitions or appeals pending presently in any state or federal court relating to the judgment and sentence under attack.

(79) William Neal Moore was represented by the following attorney:

(i) At trial and on appeal to the Supreme Court of Georgia, by Hinton R. Pierce, Augusta, Georgia;

(ii) on petition for certiorari to the Supreme Court of the United States, by Hinton R. Pierce;

(iii) on the motion for a declaratory judgment (and the appeal from denial of that motion), and on the motion to withdraw the plea of guilty, by Hinton R. Pierce;

(iv) on the state habeas corpus petition in the Superior Court of Jefferson County, by James C. Bonner, Jr., Athens, Georgia;

(v) on the initial federal habeas corpus petition, by James C. Bonner, Jr., Athens, Georgia;

(vi) on the effort to amend the original federal habeas corpus petition by H. Diana Hicks of Nashville, Tennessee;

(vii) on appeal from this Court's judgment of habeas corpus relief to the United States Circuit Court of Appeals for the Eleventh Circuit by Daniel Givelber and Donald Berman of Boston, Massachusetts;

(viii) on petition for certiorari to the Supreme Court of the United States, by Daniel Givelber and Donald Berman;

(ix) on petition for habeas corpus relief to the Superior Court of Butts County, by Tony L. Axam of Atlanta, Georgia, Daniel Givelber and Donald Berman.

(80) Hinton R. Pierce was retained by petitioner's family to represent petitioner at trial. Mr. Pierce was court-appointed to represent the petitioner on appeal on the basis of findings that the petitioner was indigent and unable to pay private attorneys any longer. Daniel Givelber and Donald Berman were appointed to represent petitioner before the United States Court of Appeals under the provisions of the Criminal Justice Act because petitioner was indigent and without funds to retain a lawyer. The other attorneys have represented petitioner without any compensation.

(81) On the judgment of July 17, 1974, that is challenged in this proceeding, the petitioner was sentenced on two counts of one indictment, and only on one indictment, in the same court, at the same time.

(82) The petitioner has no sentence to serve other than the sentence of death which is challenged herein.

WHEREFORE, the petitioner William Neal Moore prays that this Court:

1. Issue a writ of habeas corpus to have petitioner brought before it to the end that he may be discharged from unconstitutional confinement and restraint and/or relieved of the unconstitutional sentence of death;

2. conduct a hearing at which proof may be offered concerning the allegations of this petition;

3. permit the petitioner, who is indigent, to proceed without prepayment of costs or fees;

4. grant the petitioner, who is indigent, sufficient funds to secure expert testimony necessary to prove the facts as alleged in this petition;

5. grant the petitioner the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in this petition;

6. allow the petitioner a period of sixty days, which period shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

7. stay the petitioners execution pending final disposition; and

8. grant such other relief as may be appropriate.

Respectfully submitted,

TONY L. AXAM
175 Trinity Avenue, S.W.
Atlanta, George 30303

DANIEL J. GIVELBER
Northeastern University
School of Law
400 Huntington Avenue
Boston, Massachusetts 02115

ATTORNEYS FOR PETITIONER

By: /s/

VERIFICATION

I hereby verify that I am one of the attorneys for petitioner and that, to the best of my knowledge and information under penalty of perjury that all of the allegations in this petition are true and correct. Petitioner is not immediately available to sign a verification; in view of the imminence of his impending execution, I am completing this verification on his behalf.

/s/
DANIEL P. GIVELBER

CERTIFICATE OF SERVICE

I certify hereby that on this ___ day of May, 1984, I served a copy of the foregoing AMENDED PETITION upon Susan Boleyn, Esq., 132 State Judicial Building, Atlanta, Georgia, 30334, who is the attorney for the respondent, by depositing same in the United States mail, properly addressed and postage prepaid.

/s/

APPENDIX I

COUNTY OF DEKALB
STATE OF GEORGIA

AFFIDAVIT

James C. Bonner, Jr., being duly sworn, states that:

(1) I am a member in good standing of the State Bar of Georgia. I make this affidavit for submission in state and federal successor habeas corpus proceedings in the case of *William Neal Moore* v. *Charles Balkcom*.

(2) In January, 1978, when Mr. Moore's first state habeas petition was filed in the Superior Court of Tattnall County, State of Georgia, I was a lawyer with the Georgia Prisoner Legal Counseling Project with a docket of approximately one hundred and fifty (150) cases, of which Mr. Moore's case was one.

(3) I prepared Mr. Moore's first petition raising several constitutional claims for post-conviction review based upon the evidence I had available. None of these claims addressed the effectiveness of Mr. Moore's counsel during Moore's sentencing trial. Indeed, since Mr. Moore had been represented by retained counsel and had plead guilty, I assessed counsel's performance solely in light of the lenient standard set forth in the guilty plea cases following *McMann* v. *Richardson* and *Tollett* v. *Henderson*. During this period of time, I never considered whether the Sixth Amendment imposed any special or aditional requirements on counsel at the sentencing phase of a capital trial, and, thus, did not separately try to assess the adequacy of counsel's sentencing performance. More specifically, I did not reflect upon Mr. Moore's right to a full opportunity to present

the circumstances of his character, record, or of his offense as mitigating factors at his sentencing trial, nor examine the adequacy of counsel's conduct in securing that right. Not until well after *Lockett* v. *Ohio* was decided, and after Moore's original state habeas petition had been denied, did the role of mitigating evidence - and thus the duties of trial counsel to investigate that evidence - first become clear to me.

(4) Further, my office did not routinely engage in factual investigation for state post-conviction clients, and because I did not not understand the law to suggest that these matters would be relevant to any contitutional claim, I did not undertake an independent factual investigation of possible constitutional claims in Mr. Moore's case. Specifically, we did not contact members of the community where the crime occurred, any relatives of the victim, Mr. Moore's peers or supervisors in the military, his former civilian employers, school officials, juvenile case workers, family and welfare workers, or other friends and acquaintances who could have provided information or testimony about him. Because my own case load was extremely heavy, it was physically impossible for me to undertake this investigation myself.

(5) As a consequence, I could not inquire into the complete silence of Mr. Moore's trial counsel with respect to Mr. Moore's childhood circumstances and his youth, his reputation as a son and father and husband, his military record, his reputation in the community where the crime occurred, the factual circumstances of Mr. Moore's life at the time of the crime, or the factual circumstances of the crime itself. I was therefore not

fully aware of inaccuracies or omissions in the presentence report upon which Mr. Moore's sentence was based which have subsequently come to my attention.

(6) Because at the time of the first state habeas proceeding I was not aware of any legal basis upon which to challenge the effectiveness of trial counsel's prformance during the penalty phase of Mr. Moore's capital trial, and futher because I did not engage in any factual investigation in support of such a claim, I did not accede to Mr. Moore's request that I raise the issue of trial counsel's lack of effective assistance at the penalty phase of the trial. Mr. Moore did not voluntarily abandon or waive these claims at any point.

(7) Subsequently, in May of 1984, I have been asked to execute this affidavit, setting forth all the facts herein. I do so now, averring that all I set forth is true and accurate.

/s/
JAMES C. BONNER, JR.

Subscribed and sworn before me,
this the 14th day of May, 1984.

Notary Public
My Commission expires:

DEKALB COUNTY
STATE OF GEORGIA

AFFIDAVIT OF JAMES C. BONNER, JR.

James C. Bonner, Jr., being duly dworn, states that:

(1) I am a member in good standing of the State Bar of Georgia. I make this affidavit for submission in the federal successor habeas corpus proceedings currently pending in the case of *William Neal Moore* v. *Charles Balkcom*. This affidavit should be read as supplementing an earlier affidavit I executed concerning my prior involvement with this case on May 14, 1984.

(2) I served as Mr. Moore's counsel during his state post-conviction proceedings and filed on his behalf his first federal habeas corpus petition in November, 1978. Customary to my practice and in accordance with the exhaustion requirements at that time, I included only claims which had been exhausted in this federal habeas petition.

(3) I am currently aware that Mr. Moore has recently filed a successor petition in the United States District Court for the Southern District of Georgia. I have further been made aware of several claims which have been raised in this petition. I have been informed that Mr. Moore has alleged that the failure of the presentence writer to advise him of his *Miranda* warnings violated his Fifth and Sixth Amendment rights pursuant to *Estelle* v. *Smith*, 451 U.S. 454 (1981). Throughout the entire period of time that I represented Mr. Moore, I was unaware of any federal constitutional

basis upon which to claim that the failure of the probation officer to warn Mr. Moore violated the federal constitution.

(4) I am also aware that Mr. Moore has asserted that his Sixth Amendment right to confrontation was violated by the introduction of the presentence report at the penalty phase of the trial and that he has based this claim upon the case of *Proffitt* v. *Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *modified*, 706 F.2d 311 (1983). Throughout the time that I represented Mr. Moore, I was not aware of a basis in the federal constitution upon which to bring a claim that the introduction of this report at the penalty phase violated Mr. Moore's constitution rights.

(5) Subsequently, in May of 1984. I have been asked to execute this affidavit, setting forth all the facts herein. I do so now, averring that all I set forth is true and accurate.

/s/ James C. Bonner, Jr.
JAMES C. BONNER, JR.

Subscribed and sworn before me,
this the 20th day of May, 1984.

/s/ Illegible Signature
Notary Public

My Commission expires:

APPENDIX J

STATE OF GEORGIA)
) ss.: AFFIDAVIT
COUNTY OF BUTTS)

WILLIAM NEAL MOORE, being duly sworn, states:

1. I am a citizen of the State of Georgia, presently under a sentence of death. I was indicted in the Superior Court of Jefferson County for murder and armed robbery; after pleading guilty to the indictment, I was convicted on June 4, 1974. I was represented at the time of my plea and sentencing by Hinton R. Pierce.

My Interview With The Probation Officer

2. During the period of time from the date of my arrest to the date of my sentencing I was incarcerated in the Jefferson County jail.

3. On one occasion following my conviction but before my sentence had been imposed, a man who said he was from the Probation Office came to see me. he told me he was conducting an investigation for the judge in may case. He did not tell me that the interview with me would be used to gather evidence necessary to determine whether I should be sentenced to death.

4. The investigator asked me many questions about my background, my juvenile record, and the circumstances of the crime. At no point in the interview did he tell me that I had a right to remain silent or let me know that what I was saying would be used against me. He did not tell me that I had a right to an attorney

or that I could stop at any point and demand to see my attorney. He did not ask me whether I waived any of my rights.

5. At no time did the investigator inform me that I had a right to have counsel present during the interview or to consult with counsel prior to the interview. He did not ask me whether I would agree to waive my right to counsel or to consult with counsel.

6. Two years later, while I was incarcerated at the Georgia State Prison in Reidsville, I first saw the presentence report that had been prepared by the probation officer based in part on the interview with me. I discovered then that the report was incomplete in many ways. Much of the information in it is inaccurate. It also does not include many facts which I did share with the investigator.

My Childhood Background

7. I am from Columbus, Ohio and I am the youngest of five children. When I was growing up, my brothers and sisters had left home or were gone most of the time. My mother had multiple sclerosis and my father was in prison from the time I was five until I was eighteen, serving a sentence imposed on him for an incestuous relationship with my sister when she was young. Because we had no regular income, we lived on welfare much of the time. I worked a full shift at a steel mill and at other jobs after school while I was a teenager to ease the financial strain. Though my goal at that time was to finish high school, the conflict between my school schedule and my work schedule became too

great. Also, from the time I was very young I cooked and did the housework because my Mother was not well.

I was the only one in my family who visited my father while he was in prison because my mother got to be too sick and the others had moved away from home. I did try to get to know my father and as best I could kept a relationship open between him and my family.

My Arrest Record

8. As a boy and a very young man, I allowed myself to become involved in occasional petty stealing in the neighborhood. Few young people from my neighborhood avoided such encounters with the law and I regret my inability then to distinguish myself. Apart from the offense for which I was sentenced to death, however, I have no record of arrests or convictions for violence against another human being.

9. I first saw the record of supposed "prior convictions" that was used in the presentence report when my lawyer was preparing my appeal to the Georgia Supreme Court. At that time I saw that the report listed ten separate juvenile offenses. In fact, I was brought before the juvenile court on only four occasions: September 8, 1964, July 25, 1966, July 10, 1967 and September 25, 1968. I had no other involvements with the law beyond occasions when I was picked up by the police and then released. The presentence report, for example, lists "molesting" as one of my prior convictions. In that incident, I was picked up by the police after a grandmother heard me say an obscenity to

another boy. No charges were brought and I was quickly released.

My entire juvenile record is contained in the State of Ohio Youth Commission file which I have attached to this affidavit (though I have no recollection of being put on probation on May 20, 1962). The reports in that file provide the facts of the offenses and of my life at the time of the offenses.

10. During the interview in 1974, I gave the investigator my best recollection of the times I had been picked up by the police as a juvenile. He did not ask me whether I had been charged and convicted for these various offenses.

11. I was not provided with a lawyer at any of my appearances in juvenile court. I was without funds to hire one on my own. I was not given a trial on any of the charges against me. I was not informed that I had the right to cross-examine witnesses who gave evidence against me. Nor was I informed that I had the right to remain silent when speaking with juvenile authorities. Finally, I never waived any of these rights.

My Military Service and Marital Difficulties

12. My brother's return from Vietnam gave me incentive to join the Army. I did so in 1970 and I made a satisfactory record in the three years I was entitled. I received a Promotion for Outstanding Soldiery during basic training in 1970 and I was promoted to E-4 status less than one year after I enlisted. In 1973, I received an Outstanding Service Award with a life-time guarantee of a job in the mail service in West Gemany. I also

completed high school while stationed in Frankfurt, Germany in 1973.

13. I told the man who interviewed me in 1974 that I had severe marital problems and that I was in great financial difficulty immediately prior to the crime. Yet none of the following circumstances were included in the report.

My wife Francine and I were childhood sweethearts, and we married when I was nineteen and Francine sixteen. At that time Francine was the greatest love in my life, a relationship rivaled only by the birth of my son in the spring of 1971. Billy Jr., became the center of my life and, because Francine was very young and unused to such work, I tended to the child's needs. At that time I had been assigned to a post in Frankfurt, Germany where I was finishing my high school credits and acting as a Brigade mail clerk for two companies.

14. When my wife and I returned to this country from my assignment in Germany, we stopped at Columbus on our way to Fort Gordon, Georgia, where I was to report for my next assignment. Two days before we were scheduled to leave for Georgia, my wife announced to us that she would never leave Columbus. I could not convince her to come with me, nor could I postpone reporting to my post and beginning further studies. I reported to Fort Gordon and decided to entrust Billy Jr., to Francine's care. In July, 1973, I lived on the base and arranged to send Francine and my son all of my pay allotment, except for $50.00 per month. Later I arranged for Francine to keep the car, and I visited by plane every weekend I could.

15. During the fall and winter of 1973 and early 1974, Francine fell in with people who were involved in drugs. At first there were only faint signs of this. Francine would promise me she would straighten up, only to fall back again. Then, when I was in the hospital at Fort Gordon for a knee injury, I began to get phone calls from my sisters and my mother-in-law informing me that Francine was with another man who was rumored to be involved in prostitution, drugs and stealing. I was told she was not caring for our child. This was a blow greater than I can state. In late Februry, 1974, after a knee operation, I received the news that made me go to Columbus to bring Billy, Jr., back to Georgia with me: my child, who was two at the time, had been found wandering outside on the street in the cold; he had on another occasion been rescued from a fire in the house of a babysitter who was often drunk. I arranged leave from the hospital, borrowed $250 from the Red Cross, rented a truck, and brought Billy, Jr., to live with me.

16. Because I moved off base to housing fit for my son, I lost my position as a platoon leader and was set back in my training. But what worried me most was Billy's caring for and our financial situation. When I asked the Army to send my allotment to me rather than to Francine, they informed me that such a change would take at least three months. I had $50.00 to tend to the housing, transportation and food for my son and me. I applied for another $250 Red Cross loan but that had not come through.

17. I gave the man who interviewed me many names of people at Fort Gordon to speak with about my record there. To the best of my knowledge he never did

so. The military personnel quoted in the presentence report are not those who had personal knowledge of my performance, and their statements are not consistent with their testimony at my Army Dismissal Hearing on May 16, 1975.

The Circumstances of My Crime

18. I did not tell the man who interviewed me that, as stated in the report, George Curtis and I went over to Mr. Stapleton's house on a number of occasions but that "every time" Curtis got drunk. That statement, attributed to me, is not true. I met George Curtis in the hospital at Fort Gordon during the spring before the crime occurred. George, a former marine, was in the bed across from mine and he told me about a man he knew who always kept $20,000 in his home. He did not tell me that that man was his uncle. The night of the crime, George Curtis had invited me to come to Wrens to his house for a party. George and I get very drunk. George took me over to Fredger Stapleton's house, went in the house with me and showed me where Stapleton slept. But we turned back and I had no intention of returning. We went back to George's and drank even more. Between 11:00 and 12:00 I left George's to go home, but I went to Fredger Stapleton's instead. I was so drunk I didn't care who saw me. I climbed in the front window and went to Stapleton's bedroom door. It was pitch black inside the house. I knocked twice but there was no answer. All of a sudden the door opened, the barrel of his shotgun hit me, then it fired. Out of panic and drunkeness, I fired back. I fired into the dark room where Mr. Stapleton must have been standing.

Not until the next morning did I fully comprehend what I had done.

19. At my sentencing hearing, I was never shown a copy of the presentence report. To my knowledge my lawyer was never shown a copy of the report prior to my sentencing. I first saw the complete report two years after I was sentenced to death and I first saw the record of my prior convictions in the report while my lawyer was appealing my case. I do not state that the assertions in this affidavit are all of the facts relevant to my case, but only that they include basic facts not mentioned or inaccurately presented in the report.

/s/ William Neal Moore
WILLIAM NEAL MOORE

Sworn to and Subscribed before me,
this the 13th day of April, 1984.

/s/ Illegible Signature
Notary Public

JAMES A. RHODES
Governor

DANIEL W. JOHNSON
Director

STATE OF OHIO
YOUTH COMMISSION

SEAL

ORDER OF DISCHARGE

This is the certify that MOORE, William Neal is hereby discharged from further care and custody by the Ohio Youth Commission on November 20, 1969 by reason of Satisfactory Completion of Placement Period.

78189
OYC NUMBER

by /s/ Daniel W. Johnson
DIRECTOR

COPIES: YOUTH
CASE RECORD
COMMITTING COURT

REPORT AND RECOMMENDATION OF REFEREE
IN THE COMMON PLEAS COURT,
DIVISION OF DOMESTIC RELATIONS

FRANKLIN COUNTY, OHIO

In the matter of: JUVENILE BRANCH
William Moore Case No. 80673
Alleged Delinquent Minor JOHNSON
(mj)

A-57874

To the said Court:

I, the undersigned, a duly appointed Referee of this Court, in accordance with the provisions of Section

2151.16 of the Revised Code of Ohio, have heard the testimony of the witnesses and considered all evidence in the above captioned matter and certify the following findings and recommendation to the Court:

That the above matter is within the jurisdiction of the Court.

The parents, guardian or person having custody of the child have been cited to appear as required under Section 2151.28 of the Revised Code of Ohio, and the following persons were present:

Mother:	Margaret Moore
Mr. Blain:	Pepsi Cola Company
Officer:	CPD

William Moore, 17, is before this Court on a charge of tampering with a safety deposit box. The facts have been admitted.

This case came to the attention of this Court through the filing of a Delinquency Affidavit #86171 filed by Probation Officer Johnson which states that on or about the 31st day of August, 1968, he did commit the offense of tampering with a safety deposit box in that he did unlawfully attempt to pry open a vending machine with a pick; said machine the property of a car wash company at 851 E, Jenkins Street, Columbus, Ohio.

The officer stated that on the 31st day of August at about 12:50 he was dispatched to a car wash south of Jenkins and west of Champion on a complaint that someone was breaking into a pop machine, the officer pulled down the lane and saw three boys by the pop machine; but they ran when they saw the officer. The officer got out of his cruiser and chased the boys, but was only able to apprehend two of them.

Mr. Blain of the Pepsi Cola Bottling Company stated that the machine was on a lease to the car wash, and that the repairs amount to about $31.55.

The Probation Department reports that William has been on probation for some period of time. On the 10th day of July, 1967 he was before the Court and placed on a suspended commitment to the Youth Commission. His contacts with this Court include: 1962 B & E, February 1964, theft; July 1966 Petit Larcency; June 22, 1967, B & E and Assault. When William was questioned as to this incident, he stated that he needed some money. There was an attempt to get this boy into some branch of the service, but these attempts failed. The Job Corp and other Vocational programs were contacted also. William's brother would like to take the responsibility of having the boy live with him and finding him a job.

In view of the foregoing facts:

I therefore recommend that the Court: ENFORCE THE COURT ORDER OF JULY 10, 196? (illegible).

I hereby certify that the child and all necessary parties have been duly informed of the foregoing report and recommendation to the Court.

Dated September 25, 1968

Illegible and Approved /s/
Johnson Referee

/s/
CLAYTON W. ROSE, JUDGE
JOHN W. HILL, JUDGE

Case No. A-57874

Name Moore, William Neal — Aff # 80673
Address 1438 Kent Street — Docket No.
Age 16 Sex Race Negro — Officer Cahill-M F Scott
Date of Birth 4-15-51 — Place Columbus, Ohio

Complaint Deliquency - Breaking and entering

Court Record 5-20-62 B & E - Probation
9-8-64 Purse theft - Probation
7-25- 66 - Petit Larceny - Probation

Institutional Experience
Detention Home - total of about three weeks

Agencies

Other Persons Involved Lawrence Jones - on probation to this court
Robert Haynes - on parole to O Y C

CLIENTS STATEMENT

I got off work and went home and then over to Curtis Turner's looking for Larry Jones. Robert Haynes, Curtis, and Larry were all there. We left and walked down Gears to Whittier. We saw this house while we were going up the alley toward Roosevelt and the people were outside. I said, "Look at those people out there cutting grass, do you want to go in?" to Robert. He said, "I don't care." Larry said he would talk to the lady and attract her attention so we could get past her. We hid next to the garage until Larry got the Lady's attention and then we (Robert and I) went into the house.

Robert picked up a radio and then the man came in and ask what we were doing there. He held out his

hand and Robert gave him the radio and then he grabbed Robert's arm. I ran out the door and down the street and then I saw Robert come out of the house with one shoe on and he had a cut on his lip. We went up to Livingston ave and then the police came and got us.

EDUCATION

William is currently enrolled at Roosevelt Junior High where he will be in the 9th grade. This past school year he successfully completed all of his subjects. His attendance was exemplary considering his prior record - he was absent but 5 ½ days due to a virus infection and was not tardy. He had no discipline problems of which I was aware.

RELIGION

Does not attend church regularly

HEALTH

No apparent problems

LEISURE ACTIVITIES

Subject lives across the street from Kent School and quite naturally spends some time there as well as the playground at Fairwood Avenue school. These seem to be primarily a place where he meets his friends rather than a place where he engages in the activities offered.

ASSOCIATES

In spite of repeated warnings, Billy has continued to associate with Robert Haynes (OYC parolee) and Larry Jones. There nefarious activities have included/ drinking beer and in the case of Larry - glue sniffing.

PARENTS

Father - in the Ohio Penitentary

Mother - Mrs. Moore is a rather pathetic case. She is crippled to the degree that it is extremely difficult for her to move around and in addition she has, in the past, been under psychatric care. She doesn't seem to be able to exercise very much control over Billy and looks to her daughter, Mrs. Norma Gripper, for assistance with any major problems that arise. She is very much dependant on Billy as he is the only child left in the home and he runs errands, does chores, and seemingly acts as the man in the house.

SIBLINGS

Sister - Norma Gripper - 30 yrs. - takes an active interest in Billy but is unable to devote a great deal of time to him because of her own family commitments. 1771 Rainbow Pk. 252-2838.

Brother - Terry Moore - currently in the U.S. Army due to the good offices of Mr. Cahill and apparently making a good adjustment. Obviously known to this court.

Brother - James - Has been having a problem adjusting to an early marriage but is currently doing better. Has, on occasion, taken Billy fishing and evidenced other interest in his baby brother.

Sister - Regina Mullins - 26 yrs. -lives out of town and I have never met her. Illegible Village Apt.

CLIENT

I have had Billy on probation since November of 1965. In May of 1966 he was released from probation as it was considered that he had made a good adjustment. He had made the Honor Roll in school, had presented

no problems in school or at home, and was associating with boys who were not predisposed to delinquency. This release was a mistake because without the control he returned to his former companions and subsequently made an appearance in court and was again placed on probation. All was well until Robert Haynes (the youth with whom he was involved on the last and this occasion) returned to the community. One of these boys obviously acts as the catalyst for the other and the end product is some type of delinquent act - usually theft.

Billy is an attractive, pleasant, and well mannered boy who is quite mallable. His intelligence is average or slightly above and he is an excellent worker when so inclined. He is quite fond of his mother although not overtly so. When I told him how broken up she was about this latest involvement he became quite emotionally upset and seemed to be more concerned about her than about what was going to happen to him.

Billy has been employed since May 15th by the NYC at Roosevelt Junior High. He has made a very good record on the job; not having missed a day and is touted by Mr. Kropfhauser (the Head Custodian) as being the best Youth Corps worker that he has had. He spends his money judiciously - buying food and clothes and helping his mother pay the bills.

SUMMARY AND RECOMMENDATIONS

In spite of the fact that Billy has many attributes which are deemed desirable we cannot overlook the fact that this is fourth time that he has been before this court. In addition he has admitted to one other theft and has violated his probation by associating with

undesirables. (He was expressly admonished to avoid Robert Haynes in Sec. 7. - Special Regulations)

On July 25, 1966, he was told by Referee Johnson that if he made another appearance before the court he would be committed to the Ohio Youth Commission.

It is therefor recommended that William Neal Moore be committed to the Ohio Youth Commission but that this commitment be witheld on a day to day basis for the following reasons:

1. He is currently employed and helping his mother who's income is approximately $107.00 dollars per month.

2. Mr. Frank Hammocks, a neighbor who is employed as a custodian at Roosevelt and with whom Billy works, has agreed to assist in Billys supervision.

3. He has become aware of his mother's dependence on him since he is the last child in the home.

M.F. SCOTT for JOHN CAHILL

APPROVED:
/s/ Clifford A. Tyree
Clifford H. Tyree - Supervisor

406 Williams Street
Wrens, Georgia
April 5, 1984

Dear Sir,

I am a great niece of my Uncle Fredger Stapleton. I know Billy Moore has been on death row for ten years. I understand there's a chance his sentence can be reconsidered and I am writing, strongly hoping this is true.

I have never met Billy Moore, but I have read his letters to my mother and my sister and I know he was more than sorry and has been ever since. If he ever wasn't good, I feel he's really changed into someone special.

Those letters touched me in a way I can't really put down on paper. But I know I want to feel like that one day. He has a kind of inner peace I want to have.

You have to wonder if someone has really changed when they say they have. But it's not like Billy came to Momma with his letters after he got death. He was writing them even before he got sentenced while in the Louisville jail. And he has continued them ever since saying he was so very sorry and that the Lord would guide us all. I believed it then and I believe it now: Billy has changed.

If God has forgiven him and if we the family feel he should be forgiven then I feel there is no way he should be executed. It seems just like Billy to forgive George Curtis for running out and turning on him, knowing he would bear it all.

I believe it would be an inspiration if Billy came to Wrens. He is sorry. He is changed with the Lord and

now changes others. Billy Moore deserves a second chance.

Sincerely,
/s/Sandra Farmer
Sandra Farmer

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104 Grace Street
Wrens, GA

March 30th, 1984

Dear Sir,

My name is Mary Jordan and I am related to Fredger Stapleton through my grandfather. I feel strongly about saying what I can and what I know of Billy Moore and what happened ten years ago.

I met Billy when my cousing George Curtis brought him home from Fort Gordon. We'd known soldiers to come out before, but Billy was real special. I can honestly say I have never met a nicer person and would say so still. He was a *good* man. Always respectful, and so kind. Whatever you needed he'd help out - would carry me to the grocery store when I needed to go and would listen to anyone's problems, including mine. I never thought twice about him staying around our houses, he was *very* trusted. I'd even trust him with my little girls, something I wouldn't do with other soldiers.

When George brought him around, I felt leary because I knew my cousin George all my life. George wasn't especially close to anybody in my family but I think I was his favorite cousin while we were growing up. I don't mean George any harm, but I thought Billy was in danger with George and I told him he didn't need to be in the street with George Curtis.

When I heard what happened at Uncle Fredger's and that Billy had been arrested, I just couldn't believe it. Unlike George, Billy wouldn't harm a hair on a dog's back - that's how gentle he was. All I could think of was how Billy brought his little son dressed so nice and how he's bring candy for my kids and lent my brother money even though Billy himself was in the hole.

I feel deeply that Billy should not be executed. I and many others I know really think he should not have been sentenced to die. I really think Billy should be free because even now it hurts me to know he's taking the whole thing by himself. I was around George Curtis a lot. I know how he was - he had to plan it. I believe he told Billy about the house, the money and everything. I encouraged Billy to tell the whole story about George but he wouldn't say anything about anyone else. He wanted to protect his friend. I imagine he felt no one knew him and so he decided to shoulder it all.

I feel nothing about what happened ever came out at the trial. The Judge or no one else ever knew about George or how drunk I've heard people who were with them say they were. I don't know what happened, but I've wanted to know. Like I said before I don't wish my

cousin any ill wi. but he was in it. George was bad through and through, just the opposite of Billy. When I say George was cruel I mean things like torturing little animals and setting his mean dog on people he knew were scared of it. And when he got older I saw some other things like when he beat his girlfriend with a whiskey bottle in the head. After he come back from Viet Nam it seemed he was even crazier.

The judge should have known a lot of things about this crime, I think there should be a trial - let everything out, bring George back to the States and listen to both. I don't see how Billy could have done it himself in any way, but even if after the trial we could say he did, I don't believe they should kill him even then.

All they had in Court was George's people. If I could have I'd have spoken right up for Billy. He should never be executed. He was and still is the nicest person I've known and is so terribly sorry about what happened. Even now in his letters he is spiritually and in every other way repentent.

Billy loved his son, and I know he had bad money problems. I think the Court should look at all of this. Please understand Billy really should not be killed now or ever.

Sincerely,
/s/ Mary E. Jordan
Mary Elizabeth Jordan

No. 87-1104

In The

Supreme Court of the United States

October Term, 1987

RALPH M. KEMP, WARDEN,

Petitioner,

v.

WILLIAM NEAL MOORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF ON BEHALF OF PETITIONER

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QUESTIONS PRESENTED

1.

Under what circumstances does a federal habeas corpus petitioner's assertion of a "change in the law" justify the failure to raise claims in an initial application for federal habeas corpus relief, so as to constitute an exception to the abuse of the writ of doctrine?

2.

Whether the "ends of justice" authorize the consideration of Respondent's belated *Gardner* claim when said claim is conclusively without merit and there have been repeated opportunities to litigate the claim prior to Respondent's second application for federal habeas corpus relief?

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No. 87-1104

In The

Supreme Court of the United States

October Term, 1987

RALPH M. KEMP, WARDEN,

Petitioner,

v.

WILLIAM NEAL MOORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF ON BEHALF OF PETITIONER

CITATION TO OPINIONS BELOW

The Petitioner, Ralph Kemp, Warden, has asked that this Court review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 4, 1984, and July 27, 1987.

The initial opinion of the United States District Court for the Southern District of Georgia denying Respondent's application for a stay of execution, denying Respondent habeas corpus relief, finding certain allegations to constitute an abuse of the writ and certain allegations to be waived, was entered on May 22,

1984. On June 4, 1984, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court and adopted the district court's opinion in *Moore v. Zant*, 734 F.2d 585 (11th Cir. 1984). (Petitioner's Appendix A).

The panel opinion was vacated by order of the Eleventh Circuit dated June 20, 1984, in which order the Eleventh Circuit granted rehearing *en banc*. (Petitioner's Appendix B). On June 27, 1987, the *en banc* court of the Eleventh Circuit reversed the district court's finding of an abuse of the writ in part and remanded the case in part. (Petitioner's Appendix C). *Moore v. Kemp*, 824 F.2d 847 (11th Cir. 1987) (*en banc*). Petitioner's petition for rehearing was denied by the Eleventh Circuit on October 7, 1987. (Petitioner's Appendix D).

JURISDICTIONAL STATEMENT

Petitioner has asked this Court to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 27, 1987. Petitioner's petition for rehearing was denied by the Eleventh Circuit Court of Appeals on October 7, 1987. The Eleventh Circuit granted Petitioner's motion for stay of the mandate until December 15, 1987. The petition for writ of certiorari was filed within the allowable ninety days and was granted by this Court on April 18, 1988. This Court's jurisdiction has been invoked pursuant to 28 U.S.C. § 2254(1).

STATUTORY PROVISIONS

Rule 9(b) of 28 U.S.C. § 2254:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and if the prior determination was on the merits, or if new or different grounds are alleged, the judge finds that the failure of petitioner to assert those grounds in a prior petition constitutes an abuse of the writ.

STATEMENT OF THE CASE

Respondent, William Neal Moore, was indicted by the grand jury in the Superior Court of Jefferson County, Georgia for the offenses of malice murder and the armed robbery of Fredger Stapleton. Respondent waived a trial by jury with respect to both charges on June 4, 1974, and thereupon entered a plea of guilty to these charges. (J.A. 4-17). Respondent's sentencing hearing was set for July 17, 1974. Prior to the sentencing hearing, probation officer J. Clark Rachels prepared a pre-sentence report utilizing information from numerous sources, including Respondent himself. According to Mr. Rachels, individual copies of this report were provided to the trial court, defense counsel and the prosecutor prior to the sentencing hearing. (J.A. 105-107). On July 17, 1974, the trial court, acting as sentencer, imposed the death penalty upon Respondent following the receipt of certain testimony and evidence for the court's consideration. (J.A. 18-80). The trial court found that the death penalty was authorized by the statutory aggravating circumstance contained in

O.C.G.A. § 17-10-30(b)(2), i.e., that the murder was committed during the course of another capital felony to wit, armed robbery.

Respondent's convictions and sentences were affirmed on direct appeal to the Supreme Court of Georgia in *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975). In its opinion, the Supreme Court of Georgia conducted its sentence review, which is mandatory under Georgia law in all cases in which the death penalty has been imposed, in accordance with O.C.G.A. § 17-10-35. This Court denied Respondent's petition for a writ of certiorari on July 6, 1976, in *Moore v. Georgia*, 429 U.S. 873 (1976).

A petition for a declaratory judgment filed by Respondent was denied by the Superior Court of Jefferson County and the judgment of that court was affirmed by the Supreme Court of Georgia in *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). A petition for a writ of certiorari to review the affirmance of the denial of the declaratory judgment was denied by the Court in *Moore v. Georgia*, 434 U.S. 878 (1977).

Respondent, represented by counsel, filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. An evidentiary hearing was conducted on March 30, 1978. On July 13, 1978, the state habeas corpus court denied Respondent the relief sought. On October 17, 1978, the Supreme Court of Georgia denied Respondent's application for a certificate of probable cause to appeal.

On November 22, 1978, Respondent filed an application for federal habeas corpus relief pursuant to 28

U.S.C. § 2254 in the United States District Court for the Southern District of Georgia. (J.A. 111-120). Following a hearing on June 18, 1979, the district court granted federal habeas corpus relief, vacating Respondent's sentence of death on the basis that the penalty was cruel and unusual under the circumstances of the case. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit and Respondent cross-appealed.

Following oral argument, a panel of the Eleventh Circuit Court of Appeals reversed the district court's judgment, insofar as the district court had conducted its own proportionality review, but granted habeas corpus relief on the basis that the sentencing court had unconstitutionally applied a nonstatutory aggravating circumstance. Petitioner filed a suggestion for rehearing *en banc* based on the latter portion of the panel opinion. The petition for rehearing *en banc* was granted, with the prior panel opinion dated June 23, 1983, being withdrawn and a new opinion, dated September 3, 1983, being substituted in its place. In its decision of September 30, 1983, the Eleventh Circuit reversed that portion of the prior opinion granting federal habeas corpus relief.

Respondent Moore then filed a petition for rehearing and suggestion for rehearing *en banc* which was denied by the Eleventh Circuit on December 13, 1983. Next, Respondent filed a petition for a writ of certiorari which was denied by this Court on March 5, 1984.

On March 12, 1984, the district court made the judgment of the circuit court its judgment in the case of

Moore v. Balkcom and Bolton, Civil Action No. 478-309. A new execution date was then scheduled for May 24, 1984. Respondent filed a successive petition for state habeas corpus relief in the Superior Court of Butts County, Georgia. On May 17, 1984, a hearing was held in the Superior Court of Butts County, Georgia on Respondent's motion for a stay of execution and on Petitioner's motion to dismiss the petition for writ of habeas corpus as successive under O.C.G.A. § 9-14-51. On May 18, 1984, the Superior Court of Butts County, Georgia entered an order dismissing the petition as successive within the meaning of O.C.G.A. § 9-14-51. Respondent sought an application for a certificate of probable cause to appeal from the order of the Superior Court of Butts County, but this application was denied on May 18, 1984.

Also on May 18, 1984, Respondent filed a successive application for federal habeas corpus relief in the district court, raising some of the issues contained in the successive petition for a writ of habeas corpus filed in Butts County and also raising other issues previously raised in prior state court proceedings. (J.A. 154-187).

On May 21, 1984, a hearing was held in the United States District Court for the Southern District of Georgia in order to allow Respondent an opportunity to present evidence and oral argument as to each of the claims raised by Respondent on their merits, as well as to respond to the Petitioner's allegation that the second federal petition constituted an abuse of the writ within the meaning of Rule 9(b) of the Rules Governing Section 2254 Proceedings.

On May 22, 1984, the district court entered an order denying Respondent's application for a stay of execution, denying Respondent habeas corpus relief and finding certain allegations to constitute an abuse of the writ and to be waived, but granting Respondent's application for a certificate of probable cause to appeal. (Petitioner's Appendix A). Respondent filed a notice of appeal to the Eleventh Circuit on May 22, 1984.

Oral argument was conducted before a panel of the Eleventh Circuit on May 24, 1984, following the granting of the stay of execution on May 23, 1984, by that court. On June 4, 1984, the panel of the Eleventh Circuit affirmed the decision of the district court and adopted the district court's opinion. *Moore v. Zant*, 734 F.2d 585 (11th Cir. 1984). (Petitioner's Appendix A).

The panel opinion was vacated by order of the Eleventh Circuit dated June 20, 1984, in which order the Eleventh Circuit also granted rehearing *en banc*. (Appendix B). On July 27, 1987, the *en banc* court reversed in part the district court's finding that there was an abuse of the writ and remanded the case in part. *Moore v. Kemp*, 824 F.2d 847 (11th Cir. 1984). (Petitioner's Appendix C). Petitioner's suggestion for rehearing *en banc* was denied by the Eleventh Circuit on October 7, 1987. (Petitioner's Appendix D).

Petitioner sought review by this Court of the *en banc* decision of the Eleventh Circuit dated July 27, 1987, which decision declined to conclude that the entire second application for federal habeas corpus

relief constituted an abuse of the writ within the meaning of Rule 9(b). (Petitioner's Appendix C). This Court granted the writ of certiorari on April 18, 1988.

ARGUMENT AND CITATION OF AUTHORITY

I. RESPONDENT'S "NEW LAW" CLAIMS COULD REASONABLY HAVE BEEN RAISED IN HIS FIRST APPLICATION, AS THERE WAS A LEGAL FOUNDATION FOR MAKING SUCH CLAIMS, AND THEREFORE, THEIR PRESENTATION FOR THE FIRST TIME IN THE SECOND APPLICATION CONSTITUTES AN ABUSE OF THE WRIT.

To delay the the ultimate resolution of a capital case and to avoid a final determinative outcome of all issues presented in such case is the aim of all capital litigants. The Respondent in this case has successfully prolonged post conviction proceedings in connection with the guilty plea he entered in June of 1974 for almost 13 years and 4 months. Respondent's guilty plea and his resulting death sentence imposed by the trial judge on July 17, 1974, have been reviewed by various state and federal courts on some 18 occasions and by 98 state and federal judges.

Respondent's first "round" of post conviction proceedings, in both state and federal courts, took 9 years and 9 months to complete. (June of 1974 to March 12, of 1984). Respondent's second "round" of post convictions review took 3 years and 5 months, ending with the decision of the Eleventh Circuit in this case, which

decision is now the subject of review by this Court. Obviously, the Eleventh Circuit's decision did not finally resolve the viability of all the claims presented by the Petitioner, but rather remanded the case for further proceedings in the district court. Thus, if left intact by this Court, this case would still not be final in any respect.

As this Court is well aware, it is now almost commonplace for federal habeas corpus petitioners, such as Respondent, to pursue at least a second round of post conviction review, in addition to the extensive review available to a federal habeas corpus petitioner in the first instance. As noted above, the second series of post conviction proceedings can be extremely lengthy, even where successive federal habeas corpus applications are subject to a legitimate pleading that there has been an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254. As the Fourth Circuit stated in *Miller v. Bordenkiercher*, 764 F.2d 245, 249 (4th Cir. 1985), in dealing with a petitioner who had attacked his guilty plea utilizing collateral proceedings for the third time, "To speak thus firmly on the matter is not to speak harshly. At some point, the system must declare that justice has been done insofar as human capacity exists to dispense it."

Therefore, it is not in an attempt to curb the utilization of the writ of habeas corpus that prompts Petitioner to note that the abuse of the writ doctrine must be more fully developed and more faithfully applied. Rather, further clarification of this doctrine is needed to guide the federal district courts in their consideration of the greatly increasing numbers of successive

applications by capital litigants, with specific guidance being needed as to any "exceptions" which are available under Rule 9(b) and the limitations on these exceptions.

The most utilized assertion by capital litigants filing successive applications for federal habeas corpus relief, in light of the prohibition against piecemeal litigation as contained in *Murch v. Mottram*, 409 U.S. 41, 45 (1976) and *Wong Doo v. United States*, 265 U.S. 239, 241 (1924), is that a claim was not previously raised in the initial application because the claim allegedly rests on a "change in the law," which has occurred subsequent to the filing of the initial application. However, by merely incanting the allegedly magic words of "change in the law," federal habeas corpus petitioners attempt to place new labels on essentially old claims and attempt to excuse the petitioner from the omission of these claims from the initial proceeding, thereby preventing the finality of judgment that would support the imposition of the death penalty. Respondent's case is part of a pattern observed by this Court in *Woodard v. Hutchins*, 464 U.S. 377, 104 S.Ct. 752, 753 (1984):

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward - often in a piecemeal fashion - only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate - even in capital cases, this type of abuse of the writ of habeas corpus.

Despite the admonition by this Court in *Woodard v. Hutchins, supra*, the district courts continue to tolerate

piecemeal litigation, and more disturbingly are increasingly tolerating an entire second or even third round of post conviction proceedings that essentially revolve around the same basic issues. Without guidance from this Court as to the standards federal district courts should utilize in reviewing clearly abusive petitions, especially where claims raised therein are allegedly based on changes in the law, endless rounds of federal habeas corpus actions are guaranteed. This is especially true in cases such as this, where more than five years elapsed between the filing of Respondent's first federal habeas corpus petition in November of 1978, and the filing of his second federal habeas corpus petition in May of 1984. It is apparent that there will be new decisions rendered by this Court and other courts during such a lengthy time period. These recent decisions then serve as the basis upon which a federal habeas corpus petitioner asserts he should be allowed to raise an abusive claim for the first time.

As noted by this Court while examining the procedural history of the case presented in *Antone v. Dugger*, 465 U.S. 200, 104 S.Ct. 962, 965 (1984), "the federal and state courts carefully and repetitively have reviewed applicant's challenges to his conviction and sentence." The same is true in this case. Nevertheless, there still is no final disposition of Respondent's guilty plea and resulting death sentence and six of the allegations now belatedly raised by Respondent were allegedly not raised in the first federal petition because they are now asserted to be based on "new law." *Moore v. Kemp*, 824 F.2d 847, 860 (11th Cir. 1987) (*en banc*).

The appropriate treatment to be given claims based on "new law" is only briefly mentioned in Rule 9(b) itself. Rule 9(b) notes the district courts' obligation to determine whether a petitioner's delay in presenting a new claim in a subsequent petition, rather than an initial application, constitutes an abuse of the writ so as to warrant the district court to decline to review these "change in the law" issues on their merits.

The disposition to be made of claims based on changes in the law is only fleetingly discussed in the Advisory Committee Notes to Rule 9(b). These Notes discuss the requirement of Rule 9(b) "that the judge finds a petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable." The Notes also provide a noninclusive list of circumstances in which the failure to raise claims in a prior petition may be excusable, i.e., a retroactive change in the law and newly discovered evidence. However, neither the Rule nor the Advisory Committee Notes deal with the ever-increasing scenario of successive petitions raising claims which allegedly could not have been presented in the prior application because they are based on "new law" which may or may not be retroactive. It is in reviewing claims based on developments in the law which are nonretroactive that the federal district courts clearly need guidance as to how such claims should be reviewed. Additionally, federal habeas corpus petitioners need to be discouraged from abusing the writ by omitting such claims from initial applications and then cavalierly asserting them for the first time after years of post conviction litigation and simply

requesting that they be reviewed for the first time based on recent legal developments.

As Justice Harlan stated in his separate concurring opinion in *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148 (1971); separate opinion at 401 U.S. 675, 91 S.Ct. 1171, 1179 (1971):

> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

As Justice Harlan also observed, "if law, criminal or otherwise, is worth having and enforcing, it must at some point provide a definitive answer to the questions litigants present or else it never provides an answer at all." *Id.* It is respectfully submitted that no answer has been provided to the Respondent in this case nor to the State of Georgia seeking to enforce its legally imposed conviction and resulting death sentence.

The federal district courts find themselves in a quandary in distinguishing between those situations in which legitimate claims are presented based on substantial departures in the law from those claims which are simply new attempts to litigate old issues. The difficulties faced by the federal courts in this respect were also addressed by Justice Harlan in his concurrence in *Williams v. United States*, 91 S.Ct. at 1181:

> Secondly, in *Desist*, I went to some lengths to point out the inevitable difficulties that will arise in attempting "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established

constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." 394 U.S. at 263, 89 S.Ct., at 1041. *See generally [Desist v. United States]* at 263-269, 89 S.Ct. 1041-1044. I remain fully cognizable of these problems and realize they will produce some difficulties in administering the writ, but believe they would be greatly ameliorated by adequate recognition of the principle of finality in the operation of the criminal process.

In attempting to develop a workable "test" for reviewing courts to utilize when examining an assertion of a change in the law that would authorize a federal district court to consider claims raised for the first time in a subsequent application for federal habeas corpus relief, Petitioner respectfully submits that it should be reiterated that once an abuse of the writ has been pled, "the prisoner has the burden of answering that allegation and of proving that he has not abused the writ." *Price v. Johnston*, 334 U.S. 266, 292 (1984). In actuality, what commonly occurs is that the government in a federal habeas corpus action pleads an abuse of the writ in connection with a second application, the habeas corpus petitioner then mouths the magic words "change in the law," citing a recent case in support of the legal claim asserted, and then it becomes the government's "burden" to establish that there has been no change in the law which would authorize the review of a claim raised for the first time in a second or third application.

This requires the government to attempt to establish the state of mind, legal ability and knowledge of the law at a particular point in time of the prior habeas

corpus counsel of the petitioner, so as to establish whether there was in fact a change in the law, whether the law has already been changed but counsel was unaware of the change, or whether there did in fact exist to the knowledge of that habeas corpus counsel a legal foundation for asserting the claim at the time that the initial application was filed. Thus, at the present time, federal district courts are struggling with a makeshift "subjective" test for determining whether there has been a change in the law which would excuse a failure to present claims in an earlier petition.

The majority of the *en banc* court of the Eleventh Circuit held that "the inquiry into whether a petitioner has abused the writ in raising a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal application." *Moore v. Kemp, supra*, at 851. Obviously, this forces reviewing courts to attempt to determine subjectively the actual knowledge of the federal habeas corpus petitioner's attorney at the time the initial petition was filed. In attempting to apply this subjective test, the Eleventh Circuit grafted the "foreseeability" inquiry of procedural default cases into an analysis under the abuse of the writ doctrine. However, Petitioner asserts that the adoption of the "foreseeability standard" in the context of an abuse of the writ case is dangerous in that it affords a way in which a petitioner can easily dismiss a properly pled assertion of abuse of the writ by merely stating that the legal principle now being asserted is a "new claim" which was not foreseeable by counsel. *Moore v. Kemp, supra* at 862-863 n. 16, Tjoflat, J., dissenting.

The method advocated by Petitioner for reviewing legal principles raised for the first time in a second or subsequent application based on an alleged change in the law would require that a federal habeas corpus petitioner continue to carry the burden of proof placed on him by Rule 9(b) to excuse his conduct, rather than the burden in effect being on the state to prove that the conduct of the Petitioner was not excusable. Petitioner also advocates that any standard adopted by this Court should take into account that when, as in this case, there has been almost five years between the filing of an initial petition for federal habeas corpus relief and the second petition, there are bound to be natural developments in the law which a petitioner will attempt to exploit as an alleged change in the law to "excuse" his abusive conduct. However, something other than mere citation to "constitutional updating" or cases which are a natural progression stemming from older landmark or seminal cases must be required prior to excusing a petitioner's failure to raise a claim earlier.

As this Court observed in the context of discussing retroactivity in *Griffith v. Kentucky*, ___ U.S. ___, 107 S.Ct. 708, 713 (1987), "the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes a vehicle for announcement of a new rule." Therefore, without some guidance and limitation on the "new law" exception to the abuse of the writ doctrine, every time a new case is decided, a "new rule" is announced which petitioners will continue to assert could serve as the basis for finding that a claim is newly available based on a change in the law.

Under Georgia law, in reviewing a second petition for state habeas corpus relief, the statutory language setting forth the determination to be made by the state habeas corpus court in reviewing a new claim asks whether the issue in question could reasonably have been raised in the earlier proceeding. *See* O.C.G.A. § 9-14-51. Petitioner respectfully submits that a similar standard should be adopted by this Court. Such a standard is sufficiently flexible to accommodate a case by case review, but still provide all parties, including the courts and litigants on both sides, a clear standard of review.

Petitioner asserts that it is only when there has been a substantial departure in legal precedent that a claimed "change in the law" would excuse the failure to raise a claim in the earlier application. If there is such a substantial departure, then by necessity, such a case would have been unforeseeable and a habeas corpus petitioner would have lacked the legal foundation upon which to assert such a claim at an earlier time. Petitioner submits that the key point of focus in a standard for review of belated claims based on an alleged substantial departure in the law would be a determination by the district court of the availability of a foundation for the belated new claim at the time the first federal habeas corpus petition was filed.

Assuming that there are no newly developed facts, the objective inquiry would be whether, at the time the first federal petition was filed, there existed an available legal foundation for raising the claim, even though there might be at the time of the second application additional cases to cite in support of the same legal

proposition. Petitioner also submits that it should not be a sufficient excuse for an abusive applicant for the writ to assert that there existed, at the time that the first application was filed, binding precedent contrary to a legal proposition asserted in the subsequent application. To continue to allow or to sanction in a new standard such a state of affairs insures that there will never be finality of any judgment no matter how conscientious the courts are in reviewing the applicable facts and law at the time that the claim is asserted.

In conclusion, Respondent submits that when the government properly pleads abuse of the writ, the threshold burden upon the applicant is to prove by clear and convincing evidence that the belated claim could not reasonably have been raised at the time of the first federal petition. Such a showing must require that the applicant demonstrate by clear and convincing evidence that the belated claim is based upon a legal foundation that did not exist at the time of the first federal petition, that this new legal foundation is not simply the product of natural development and constitutional updating in the law, and finally, that the asserted new legal foundation is in fact a substantial departure from prior legal precedent.

Turning to the specific "new law" claims raised by Respondent in his second application:

(i)

Respondent alleges that his constitutional rights were violated because he was not advised of his right to

remain silent or his right to counsel prior to the presentence review conducted by Mr. J. Clark Rachels, a probation and parole supervisor. Respondent has contended that this claim rests on the decision of this Court in *Estelle v. Smith*, 451 U.S. 454 (1981). Basically, this is an attack on the circumstances surrounding the compiling of the pre-sentence report, which report was based, in part, on Respondent's interview with Mr. Rachels. The contents of the pre-sentence report and the circumstances surrounding the compilation of this report have been litigated throughout Respondent's post-conviction proceedings.

Respondent raised issues surrounding the pre-sentence report by amendment to his application for federal habeas corpus relief filed in the United States District Court for the Southern District of Georgia in October of 1980. However, the district court disallowed this untimely amendment finding that:[1]

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[1] In paragraph 5(a) of the original petition for writ of habeas corpus filed in the Superior Court of Tattnall County, Respondent alleged that his prior arrest record contained in the pre-sentence report was presented to the trial judge without the Respondent or his counsel being afforded a fair opportunity to explain or rebut it. The order of the Superior Court of Tattnall County, Georgia, in considering Respondent's first petition for writ of habeas corpus filed in 1978, clearly reflects that the officer who prepared the pre-sentence report filed an affidavit in the first state habeas corpus case stating that prior to sentencing, Mr. Rachels furnished a copy of the report to Respondent's attorney and Respondent's attorney requested a recess to review the contents of this report. (J.A. 105-107).

Nonetheless, the Court can see no sound reason for permitting further amendment at this late stage of the present case. As respondent points out, petitioner here has been represented by counsel at all times. Furthermore, counsel made explicit reference to the pre-sentencing report issue in the original habeas petition, thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from Mr. Pierce and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence in the trial transcript, which appears to show that the report was turned over to Mr. Pierce, the transcript of July 17, 1978, at 28-28, the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination. Thus, the Court can find no basis for concluding that any sound reason exists to allow new counsel to resurrect this question. Motion to amend with respect to this argument is therefore denied.

Blake v. Zant, 513 F.Supp. 772, 805 (S.D.Ga. 1981).

Even though the report has been the subject of litigation, this is allegedly a different claim because it rests on "new law," the same being this Court's opinion in *Estelle v. Smith*, 451 U.S. 454 (1981). Petitioner has consistently urged that the decision in *Estelle v. Smith*, *supra*, is not a substantial departure in the law and does not establish new constitutional principles and a legal foundation which were unavailable to Respondent, who was represented by counsel, at the time of his first state and federal habeas corpus proceedings. Although this Court's decision in *Estelle v. Smith*, *supra*, was rendered on May 18, 1981, while the district court denied Respondent's first application on April 29, 1981, this Court in *Estelle v. Smith, supra*, relied on the much earlier decision of the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Estelle v. Smith, supra*, also relied on the prior decision of the Court in *In Re Gault*, 387 U.S. 1 (1967), in which the Court held that the "availability of the [Fifth Amendment] privilege does not turn upon the type of proceedings in which its protections are invoked, but upon the nature of the statement or admission and the exposure which it invites." *Id.* at 39 as cited in *Estelle v. Smith*, at 462.

Petitioner has repeatedly asserted that this Court did not create a new constitutional right in *Estelle v. Smith, supra* as alleged by Respondent, but rather relied on its prior decision in determining the facts as presented to this Court in *Estelle v. Smith, supra*. No new constitutional principles were announced and there was no substantial departure from existing law such as to provide Respondent, at the time of the subsequent petition, with a legal foundation which did not exist at the time of the first petition. Respondent could have raised these allegations in his first application utilizing in *In Re Gault, supra*, or *Miranda v. Arizona, supra*.

The Eleventh Circuit concentrated on the foreseeability of *Estelle* when it held as follows:

> We hold that in November 1978, two and a half years before *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.E.2d 359 (1981), reasonably competent counsel preparing the first petition could not reasonably have been expected to see the Fifth

> and Sixth Amendment implications of Moore's presentence interview. In particular, counsel is not chargeable with an anticipation of the potential intersection of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) with the sentencing phase of a bifurcated Georgia capital murder trial. As a result, Moore's failure to raise the *Miranda* claim in his first habeas corpus petition was not an abuse of the writ.

Moore v. Kemp, supra at 851.

The proper inquiry is not one of foreseeability, but rather whether the claim could reasonably have been raised in 1978 at the time of the first application. Petitioner submits that the burden rested upon the Respondent in the district court to prove by clear and convincing evidence that this belated claim is based upon a legal foundation that did not exist at the time of the first federal petition, that this new legal foundation is not simply the product of natural development and constitutional updating in the law and that the asserted new legal foundation is in fact a departure from prior legal precedent.

In the separate opinion of Judge Tjoflat in which Judge Vance joined, it was properly concluded that:

> A review of the state of the law in 1978 demonstrates that the Fifth and Sixth Amendment claims I have described, i.e., Moore's *Estelle v. Smith* and *Proffitt* claims, were available to a reasonably competent attorney. In the next two parts of this opinion I discuss the specific procedural antecedents of *Estelle v. Smith* and *Proffitt*. Contrary to the majority's conclusion, I believe that these antecedents provided Moore with the tools to present his Fifth and Sixth Amendment claims in his first federal habeas corpus petition.

Moore v. Kemp, supra at 869.

Petitioner respectfully submits that Judge Tjoflat properly utilized an objective standard in determining if there existed a legal foundation for the claim at the time of Respondent's first application, instead of focusing on the subjective state of mind of Respondent's habeas corpus attorney and thereby unduly focusing on the element of foreseeability.

Petitioner respectfully submits that with respect to this claim, this Court should reverse the *en banc* opinion of the Eleventh Circuit and find, as did Judge Tjoflat, that:

> The state of the law in 1978, when Moore filed his first federal habeas petition, demonstrates that he cannot be excused for having failed to recognize and allege his *Estelle v. Smith* claim. *Estelle v. Smith* was merely the refinement of constitutional principles that the Supreme Court had already established; Moore therefore had ample thread from which to weave the Fifth and Sixth Amendment claims recognized in that case when he first sought federal habeas relief.

Moore v. Kemp, supra at 870-871.

Because Respondent failed to carry his burden of proof on all three factors entailed in a proper abuse of the writ analysis, the circuit court's decision requires reversal.

(ii)

The next claim raised by Respondent under the pretext of "new law" is Respondent's claim made pursuant to *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.

1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983). In similar fashion to the *Estelle* claim, the Eleventh Circuit found:

> As we concluded with respect to the *Estelle v. Smith* claim, the failure of Moore and his counsel in 1978 to anticipate this extension does not render the omission of the claim from the first petition an abuse of the writ. Accordingly, we reversed the district court's dismissal of the *Proffitt* claim on abuse grounds and remand for the reconsideration of the merits of the claim.

Moore v. Kemp, supra at 854.

Again, Judge Tjoflat properly analyzed the issue of whether the *Proffitt* claim was abusive, as follows:

> In his second federal habeas petition, Moore also presented, for the first time in federal court, a claim that the admission into evidence of the presentence report violated his Sixth Amendment right to confront and cross-examine the witnesses whose statements the report memorialized. Specifically, he alleged that an opportunity to confront and cross-examine those witnesses 'could have corrected the misimpressions about his financial, military and marital circumstances, clarified the circumstances of the crime, and presented the truth about his prior juvenile record.' The majority today holds that Moore's failure to raise this claim in his earlier petition was excused because confrontation rights were not explicitly extended to capital-sentencing proceedings until this Court's decision in *Proffitt v. Wainwright*, (*cites omitted*). Because I believe that *Proffitt*, like *Estelle v. Smith*, did not articulate a new constitutional rule, I would affirm the district court's judgment that Moore's omission of this claim in his earlier petition was not excusable.

Moore v. Kemp, supra at 872-873.

Judge Tjoflat went further and noted that, "Although the law in this field was in a state of disarray, the clear trend was toward expanding the full panoply of Sixth Amendment rights including the confrontation rights." *Moore v. Kemp, supra* at 873. Judge Tjoflat then concluded:

> By themselves, these cases probably foreshadowed our court's holding in *Proffitt* and provided a reasonable basis for the confrontation clause claim Moore seeks to present at this time period. Indeed, this type of claim was recognized by many commentators and attorneys well before Moore filed his first habeas corpus petition in late 1978.

Id. at 874.

Then Judge Tjoflat properly found two additional factors to "compel the conclusion that a *Proffitt* claim was available in 1978." Judge Tjoflat stated:

> Moore's habeas attorney should also have been prompted to raise a *Proffitt* claim (1) because Moore was convicted of a capital crime and (2) because the Supreme Court handed down *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.E.2d 393 (1977), more than one year before Moore brought his habeas petition in federal court.
>
> In light of the special nature of capital punishment, a reasonable attorney would have been more likely to press a confrontation clause argument with regard to capital sentencing than with regard to non-capital sentencing.

It is clear that Respondent's counsel had ample "legal ammunition" in 1978 to raise this claim. As noted earlier, because Respondent has completely failed to

carry his burden of proof on all three components of a proper abuse of the writ analysis, this circuit court's decision requires reversal.

II. THE "ENDS OF JUSTICE" DO NOT REQUIRE CONSIDERATION OF RESPONDENT'S BELATED CLAIM MADE PURSUANT TO *GARDNER V. FLORIDA*, 430 U.S. 349 (1977).

(i)

Respondent's first petition for the writ of habeas corpus filed in the Superior Court of Tattnall County, Georgia contained the allegation, under paragraph 5(a), "His prior arrest record, contained in a pre-sentence report, was presented to the trial judge without the Petitioner or his counsel being afforded a fair opportunity to explain or rebut it." The state habeas corpus court, in denying Respondent's petition specifically found, citing pages 27 and 28 of the trial transcript, that Respondent's allegation that his constitutional rights were violated because the state allegedly failed to furnish Respondent or his attorney a copy of the pre-sentence report was without factual merit. (J.A. 48-49). *See also Blake v. Zant*, *supra* at 805. Thus, it is clear that this allegation had been exhausted in the state courts before Respondent filed his first federal application. This issue whose basis is *Gardner v. Florida*, 430 U.S. 349 (1977) was clearly ripe for presentation and review by the federal district court at the time Respondent filed his first federal

application. This Court's decision in *Gardner v. Florida, supra*, was rendered prior to the filing of the first federal application on November 22, 1978.

When Respondent filed his first federal petition on November 22, 1978, he did not include a *Gardner* claim. Because the *Gardner* claim was noted, however, in the procedural history portion of the petition and because Respondent was then being represented by the same attorney who litigated Respondent's state habeas corpus petition, this omission, as noted by Tjoflat, Judge, dissenting at 875, "appears to have been deliberate." Respondent did not seek to add the *Gardner* claim until October 1, 1980, via a disallowed amendment.

Respondent reasserted the *Gardner* claim in his second petition. In reviewing the abusive nature of the second federal application the Eleventh Circuit properly found, "*Gardner* was decided in 1977; therefore this is not a claim based on alleged 'new law' declared since the first federal petition." *Moore v. Kemp*, *supra* at 855. Nevertheless, the Eleventh Circuit vacated the order of the district court finding Respondent's *Gardner* claim to be abusive and remanded the case "in order that the district court can give fresh consideration to whether the ends of justice require it to consider the merits of this claim." *Moore v. Kemp*, *supra* at 857.

In the district court's order dismissing the *Gardner* issue as an abuse of the writ, that court correctly concluded that Respondent's claim was factually without merit.

> [C]ounsel made explicit reference to the presentencing report issue in the original habeas petition,

> thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from [Moore's trial counsel] and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence and the trial transcript, which appears to show that the report was turned over to [Moore's trial counsel], the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination.

Moore v. Kemp, 824 F.2d at 876.

As Judge Tjoflat correctly opined on the basis of the application, files and records of this case as such appeared in the district court, the circuit court and now before this Court, this claim should be treated as being conclusively without merit. *Id.* at 876-877, citing *Sanders v. United States*, 373 U.S. 1, 15 (1963). For this reason, the circuit court's decision remanding this claim should be reversed.

Petitioner submits that a remand in light of *Smith v. Murray*, 477 U.S. 527 (1986), is unwarranted because the concerns for the "fundamental principles of justice" implicated in the context of a procedurally defaulted claim are not congruent with and do not mirror those concerns of a federal reviewing court attempting to determine whether the ends of justice require relitigation of a claim previously raised. In a procedural default case, the inquiry is whether with respect to the scope of the federal court's initial review, the applicant should be afforded any review on the merits of an untimely raised claim. However, an ends of justice

analysis becomes operative only *after* the applicant has already been afforded his opportunity for federal review of this claim on the merits and he seeks to have the identical claim revisited on the merits in a subsequent application.

The fundamental policy concern which underlies the concept of procedural default is the desire for comity between sovereigns. However, the fundamental policy concern which underlies the concept of ends of justice is deference by a federal court to the concept of law of the case. Therefore, *Smith v. Murray*, *supra*, would provide no "guidance" to the district court in addressing the *Gardner* claim and the circuit court erred in remanding for such purpose.

(ii)

Finally, notwithstanding the repeated opportunities presented to the Respondent to litigate the presentence report and all of the circumstances surrounding it, Respondent simply did not pursue the *Gardner* claim in federal court until the untimely amendment to the first application was filed. The law and the facts were available to raise such a claim, at the time of the first federal application, but the claim was simply omitted. Equitable principles do not operate under these circumstances to warrant a review of this claim under the "ends of justice."

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court reverse those portions of the Eleventh Circuit's *en banc* decision which declined to find an abuse of the writ as to any of the issues raised by Respondent in his second application for federal habeas corpus relief. Petitioner further prays that those portions of the Eleventh Circuit's *en banc* opinion which remand this matter to the district court for further consideration be reversed, Petitioner further requests that the Eleventh Circuit be directed to conclude that Respondent's second application in its entirety constitutes an abuse of the writ and that this Court order that any existing stay of execution be lifted with respect to Respondent's case.

Respectfully submitted,

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Are the federal courts free to reject the standard for the review of second habeas petitions adopted by Congress, which is presently embodied in 28 U.S.C. § 2244(b) and Rule 9(b), and to adopt a new standard responsive to supposed policy concerns that Congress has considered and rejected?

2. Should a mandatory rule be adopted to bar all claims omitted from an initial federal habeas petition, or is the substantial discretion presently vested in the federal district courts—which empowers them summarily to dismiss second habeas petitions when applicants have deliberately withheld claims or acted with inexcusable neglect—adequate to deal with abuses of the writ?

3. Should an indigent, death-sentenced habeas applicant—initially represented by a volunteer attorney who openly refused to raise several substantial constitutional claims on his behalf—be deemed to have abused the writ when he promptly sought to amend his initial federal petition as soon as he was able to retain new counsel?

4. Should a district court—which has already acknowledged that uncorrected errors in respondent's presentence report "materially altered the profile before the sentencing judge," and created "sufficient likelihood that a wrongful sentence was imposed based on inadequate information"—be allowed to consider on remand whether the "ends of justice" require respondent's challenges to the presentence report to be determined on their merits?

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Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Act*, 63 Iowa L. Rev. 15 (1977)	26
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H.R. Rep. No. 1892, 89th Cong, 2d Sess. (1966)	23, 24
H.R. Rep. No. 94-1471, 94th Cong., 2d Sess. (1976)	27
J. Pomeroy, *Treatise on Equity Jurisprudence* (5th ed. 1941)	33
S. Rep. No. 1559, 80th Cong., 2d Sess. (1948)	22
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Speedy Trial: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 92nd Cong., 1st Sess. (1971)	25
Yackle, *Postconviction Remedies* (1981 & 1986 Cum. Supp.	28

STATEMENT OF FACTS

I. The Trial Proceedings

A. The Crime

At the time of the crime, William Neal Moore was a 22-year-old black soldier who had recently been transferred from a post in West Germany to Fort Gordon, Georgia. (J.A. 101-02). While undergoing a six-month hospitalization (*id.*), Mr. Moore learned that his wife, who had refused to follow him to Ft. Gordon, had fallen in "with another man who was rumored to be involved in prostitution, drugs and stealing." (J.A. 198-199).

In late February, 1974, after leaving the hospital, Mr. Moore returned to his wife's Columbus, Ohio home, assumed full responsibility for the couple's two-year-old child, Billy Jr.—who "had been found wandering outside on the street in the cold," abandoned by his mother (J.A. 199)—and brought the child to Ft. Gordon. Mr. Moore moved off the base, gave up his responsibilities as a squad leader, and began caring for his son while attempting to maintain his other military duties. (*Id.*).

Because Mr. Moore had previously instructed Army paymasters to send all but $50 per month of his military pay to his wife, he found himself without sufficient funds to cover off-base expenses for himself and the child. (J.A. 198-99). At the time of the crime, Mr. Moore had borrowed $250 from the Red Cross and was seeking another $250 Red Cross loan. (J.A. 199).

Mr. Moore had became acquainted with many local citizens of the nearby black community of Wrens, Georgia through another Ft. Gordon marine, George Curtis, who was from Wrens. (J.A. 211-212). On the weekend of April 2, 1974, Mr. Moore traveled to Wrens with George Curtis, where they drank "beer, wine and some liquor" (J.A. 63) and became "very drunk." (J.A. 200). According to Mr. Moore, at some point the two men started for the home of Fredger Stapleton, George Curtis' uncle, an elderly man known to keep a large sum of money at his home. (J.A. 50-51). As the two reached the Stapleton house, "Curtis got scared" and they returned to Curtis'

home. (J.A. 70-71; 200). Some time later, Mr. Moore returned and entered the Stapleton house alone.

Moore, very drunk, had just gone into Mr. Stapleton's living room when Stapleton awoke and

> came out of his bedroom with a shotgun . . . [Moore] knocked the shotgun to the left, a shot fired from the shotgun and at the same time, [Moore] pulled his gun out and fired.

(J.A. 50). Mr. Stapleton was mortally wounded when two bullets entered his chest. (J.A. 27). Mr. Moore went to Stapleton's bedroom, took money from some pants that were lying in the room, and departed, carrying Stapleton's shotgun. (J.A. 50).

Investigators contacted Curtis the following day; he said that Mr. Moore "must have been the one responsible." (J.A. 60). When arrested soon thereafter, Mr. Moore confessed his role in the crime and expressed regret. (J.A. 49-50).

B. Mr. Moore's Guilty Plea

Mr. Moore retained a local Augusta, Georgia attorney, Hinton Pierce. (J.A. 19-20). Mr. Pierce advised his client to plead guilty, and on June 4, 1974, Mr. Moore did so. (J.A. 5). At Pierce's suggestion, Moore waived his right to a jury trial on the issue of sentence, *see* Former Ga. Code Ann. §26-3102. A sentencing hearing was directed for July 17, 1974, before Hon. Walter McMillan. (J.A. 6-7).

C. The State's Presentence Investigation

Despite Georgia legislation forbidding the use of presentence reports in capital cases after July 1, 1974, *see*, *Munsford* v. *State*, 235 Ga. 38, 218 S.E.2d 792, 797-798 (1975), Judge McMillan inexplicably directed a local probation officer, J. Clark Rachels, to conduct a presentence investigation and prepare a report for the July 17, 1974 sentencing hearing. (J.A. 105). Rachels held a lengthy meeting with Mr. Moore in his jail cell, in the absence of Moore's attorney. (J.A. 106; 194). During

his interview, Rachels failed to inform Moore that he had a right to remain silent, that he had a right to the presence of his attorney, Mr. Pierce, and that anything Moore said could be used against him during the sentencing hearing. (J.A. 194-95). Mr. Moore was not solicited to, and did not, waive any of his constitutional rights during this interview. (J.A. 195).

Officer Rachels subsequently prepared an extensive, five-page, single-spaced "case study," (*see* J.A. 93-104) which was incorporated into an overall presentence report comprising over 60 pages of official documents and reports. The report was introduced into evidence during the sentencing hearing.

D. The State's Presentation Report

Mr. Rachel's five-page case study (*see* J.A. 93-104), contained numerous errors. These errors misstate (1) the events of the crime; (2) Mr. Moore's marital and economic circumstances; (3) the attitudes of the victim's family; (4) the attitudes of Mr. Moore's military superiors; and (5) Mr. Moore's prior criminal record—all errors relevant to Mr. Moore's present constitutional challenges.

(1) In describing the crime, Rachels suggested that Curtis and Moore had attempted to rob Mr. Stapleton on more than one occasion, but that "every time, Curtis got drunk." (J.A. 97-98). The direct evidence indicates, on the contrary, that Mr. Moore and Curtis made *only one attempt* to commit the robbery—on the evening of April 2, 1974, when Mr. Stapleton was shot and killed. (J.A. 50-51; 200).

Rachels also wrote that "Moore states he . . . shot the man four times and during this time, the shotgun went off." (J.A. 98). The record evidence indicates, however, that Stapleton first hit Moore with the barrel of his shotgun and then fired the shotgun in his darkened living room, all *before* Mr. Moore drew his pistol and fired in response. (*See* J.A. 50; 200).

(2) Mr. Rachels also reported to the Superior Court that Moore and his wife "seem to have no marriage problems." (J.A.

102). Yet, as indicated *supra*, Mr. Moore had in fact recently become estranged from his wife, who had turned to prostitution and drugs, abandoning their two-year-old child to Moore's sole care. Rachels' report did note that Mr. Moore had no cash on hand (J.A. 102), but he failed to describe the extent or nature of Moore's desperate financial situation or indicate that Moore had been seeking emergency loan funds from the Red Cross at the time of the crime.

(3) Mr. Rachel's report included reputed accounts of the attitudes of four members of Fredger Stapleton's family, three of whom reportedly urged vehemently that Moore receive a death sentence, insisting that Moore "should be punished to the fullest extent of the law." Mr. Rachels' report did *not* include statements from the many persons in the black community of Wrens—including many Stapleton family members—who believed that George Curtis's instigating role in the crime had never been made public, and that Mr. Moore should not receive a death sentence. (*See* Federal Petition, Appendix K) (sixteen letters and affidavits of Jefferson County citizens supporting more lenient treatment of Mr. Moore). For example, Sara Farmer, Fredger Stapleton's niece, has related her willingness to have testified *on Mr. Moore's behalf* during the sentencing hearing:

> I saw Billy [Moore] . . . in Court at the [July 17th sentencing] hearing. His sisters were there. Billy's sister came over to us and she said will you help us. She was scared Billy could receive the death sentence. I said I didn't want Billy to be electrocuted . . . I told Billys [sic] sister, no, Billy will not be electrocuted, they don't do that anymore and we don't want that. But then the Judge came in an he sentenced Billy . . . If I could have, I would have stood up and said No, please don't take his life.

(Federal Petition, Appendix K, Sara Farmer Letter, at 2). Mrs. Mary Jordan, another Stapleton relative, also stated that she would have spoken against Mr. Moore's death sentence. (J.A. 211-13).

(4) Although Mr. Rachels' report accurately summarized Mr. Moore's military record, (J.A. 102), it indicated that Moore's commanding officer did "not know too much about this soldier" and had stated "that he was not doing anything good or anything bad." Two other sergeants reflected a similar lack of familiarity with Mr. Moore's character and behavior. (J.A. 103). Yet Mr. Moore gave Officer Rachels the names of many officers at Ft. Gordon who had direct and highly favorable comments about him (J.A. 199); no comments from these soldiers were included in Rachels' written report to the Superior Court. (*See* J.A. 199-200; J.A. 168-169; Federal Petition, Appendix K, at 9).[1]

(5) Finally, Mr. Rachels listed 10 juvenile offenses in a portion of his "case study" devoted to Mr. Moore's criminal record. (J.A. 99). In fact, Moore had been brought before the juvenile courts on only four occasions; the other alleged offenses—such as an unexplained "molesting" charge, which involved no more than an unverified complaint by an elderly woman that young Moore voiced an obscenity in the presence of another boy, (J.A. 197)—had never resulted in any formal charges, much less any convictions. (J.A. 196-97).

E. The Sentencing Hearing

Mr. Moore's sentencing hearing before the Superior Court was relatively brief. The State submitted the Rachels presentence report and offered live testimony from a medical examiner (J.A. 25-29) and from three investigating officers (J.A. 29-63). The parties have strongly disagreed on whether Moore and his counsel were allowed to review the report prior to the hearing. It is undisputed, however, that the state habeas court

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[1] During his Army Dismissal Hearing after receipt of his death sentence, Moore was described by his platoon sergeant as "always a sharp-looking soldier" whose "attitude about the Army was excellent," a soldier who "did an excellent job . . . as a squad leader" and who had a special ability to iron out conflicts. (Federal Petition, Appendix K, at 9).

made no findings on (i) the extent of the opportunity, if any, afforded Mr. Moore and his counsel on July 17th to examine the five-page "case study" portion of the 72-page Rachels report, or (ii) whether Mr. Pierce or Billy Moore actually *did* examine that case study.

Defense attorney Hinton Pierce presented no structured defense in response to the State's sentencing case. Instead, Pierce simply informed the court that several members Moore's family were present and invited the judge himself "just [to] swear them and let them take the stand and let them tell you whatever they want to say, any way the Court wishes." (J.A. 64). The entire testimony from these witnesses comprises less than five pages of the hearing transcript. (J.A. 64-70). When the court asked the last witness whether she had "anything else [she] . . . would like to say," she responded, "I probably will think of a million things when I sit down." (J.A. 69). Throughout, Mr. Pierce asked not a single question of a single witness.

Billy Moore then took the stand. Mr. Pierce once again declined to ask any questions, instead inviting his client simply "to try as best you can to tell the Judge how you got mixed up and how you came about doing this thing and how you feel about it." (J.A. 70). Moore's direct testimony comprises less than a full transcript page. (J.A. 70-71). Mr. Pierce introduced no evidence to correct or contradict the erroneous statements in the presentence report. He did not seek to call Mr. Rachels, or to question any of the persons cited in the case study about their statements.

Georgia law in 1974 permitted a capitally-sentenced defendant to withdraw a guilty plea after sentence was pronounced, but before it was physically entered by the clerk. *See, e.g.*, *Williams* v. *State*, 148 Ga. App. 521, 251 S.E.2d 601 (1978). Yet Mr. Pierce advised Mr. Moore not to withdraw his plea, even if the trial judge imposed a sentence of death (Federal Petition, Appendix B, at 16), and he made no effort to withdraw the plea when the judge sentenced Mr. Moore to death.

F. The Trial Judge's Sentencing Report

In pronouncing sentence, the trial judge expressed the opinion that Mr. Moore had done "everything that a man could do after [he was] . . . caught and [did] an honorable thing insofar as your true statements made, your cooperation with the officials, pleading guilty to the mercy of the court." (J.A. 77). He nevertheless imposed a death sentence, setting forth his reasons in a sentencing statement. (J.A. 77-79).

Subsequently, pursuant to Georgia law, *see* Former Ga. Code Ann § 27-2537, the trial judge completed a six-page Trial Judge's Report to the Supreme Court of Georgia. The report establishes affirmatively that the trial judge relied on several inaccurate portions of the Rachels case study. For example, the judge indicated in response to a question on the report concerning nonstatutory aggravating factors that

> on another occasion the defendant had entered the house of the deceased and [the crime] was not completed. The defendant returned again on the date that the robbery and murder occurred. In other words, this crime had been planned for sometime prior to its execution.

(J.A. 86). In response to a question concerning the defendant's "record of prior convictions," the trial judge recited two of the 10 prior convictions shown by the Rachels report and then explicitly stated, "Juvenile violations—see Probation Officer's report." (J.A. 89).

II. The Initial Habeas Corpus Proceedings

A. State Habeas Corpus Proceedings

After his direct appeal had been denied, Mr. Moore's case fell to James Bonner, an attorney with Georgia's state-funded Prisoner Legal Counseling Project. At that time, Mr. Bonner had responsibility for "a docket of approximately one hundred and fifty (150) cases, of which Mr. Moore's case was one." (J.A. 189). Mr. Bonner filed a short, four-page state habeas corpus petition in the Superior Court of Tattnall County, asserting five constitutional claims. He did not assert the ineffective assistance of

Moore's trial attorney, apart from counsel's failure to withdraw Moore's guilty plea after the imposition of a death sentence. (Federal Petition, Appendix A). In its subsequent opinion, the state habeas court ultimately made factual findings upholding trial counsel's performance at both the guilt phase and the sentencing phase.

Mr. Bonner did claim that the State's use of the Rachels "case study" violated Mr. Moore's Eighth and Fourteenth Amendment rights as interpreted in *Gardner* v. *Florida*, 430 U.S. 349 (1977). (Federal Petition, Appendix B, 15-18; 22-27). Addressing the *Gardner* claim, the state court noted the following excerpt from the July 17th sentencing transcript:

> BY MR. THOMPSON [District Attorney]: Now, if Your Honor please, we have referred on several occasions to a report that was made by the Probation Officer, Mr. Clark Rachels, which included a Crime Lab report, I would like to submit the entire records [sic] as State's Exhibit No. 27 that you now hold in your hand. Counsel for the Defendant has received the copy of the report so that it will include in the record. . . .
>
> BY MR. PIERCE: This is agreeable, Your Honor, and at the same time, we would like for a copy of the warrants to go in also.

(Federal Petition, Appendix B, 20-21). It also noted the affidavit of Officer Rachels summarized below.[2] After reciting

[2] Mr. Rachels submitted an affidavit to the state habeas court averring that, on the date of the sentencing hearing, he furnished a copy of the report to Hinton Pierce, who allegedly "requested a short recess prior to sentencing, that he may have time to review the contents" of the report. (J.A. 106). Rachels' affidavit also suggests that Mr. Moore was shown at least the "Personal Statement" portion of the report by Mr. Pierce, who asked Mr. Moore "if the contents of the personal statement contained in the report is what [Moore] . . . related to officers." (*Id.*)

Both Hinton Pierce and Mr. Moore sharply disputed this account. Mr. Pierce (who is currently the Untied State Attorney for the Southern District of Georgia), gave live testimony before the state habeas court, denying that he ever saw the report prior to sentencing:

> I'll say this, I have never seen a presentence investigation report prior to sentencing in any State Court that I can recall. An I'm sure if I had seen it in this case, I would have remembered it, because it would have been most unusual . . .]. The only time I saw it was [sic] in the transcript when I went up to the Supreme Court.

(J.A. 108-109). Mr. Moore has averred that he first saw the presentence report some two years after he had been sentenced, while incarcerated on Death Row at the Georgia State Prison. (J.A. 195).

these two items, the state habeas court summarily concluded that Mr. Moore's *Gardner* claim was "without merit." (*Id.*). The Supreme Court of Georgia thereafter declined to review the judgement of the state habeas court.

B. The Initial Federal Proceedings

After exhausting state proceedings, Mr. Bonner filed a federal petition for a writ of habeas corpus on November 22, 1978, asserting four federal constitutional claims. (J.A. 111). Mr. Bonner did not carry forward the *Gardner* claim, nor did he include any claim that Mr. Moore's trial counsel had been ineffective.

In early February, Mr. Bonner informed Moore by telephone that he intended to withdraw as counsel. Mr. Moore sought to file an amended, *pro se* federal petition, alleging various failures by his trial attorney. (J.A. 142-53). Shortly thereafter, on March 19, 1979, Mr. Bonner formally moved the federal court to be relieved as lead counsel for Mr. Moore.[3] During a

[3] The motion noted Mr. Bonner's seven-attorney office had been placed under a federal court mandate during 1978 to provide legal services to 14,000 Georgia inmates in 56 different Georgia facilities (Motion, at 1), and that Bonner's seven-lawyer staff already had eleven capital cases to service. Mr. Bonner informed the federal court that "in order to assure that the Petitioner's right to a full collateral review of his death sentence is not prejudiced by the responsibilities to others under death sentence which have fallen upon his present counsel," Mr. Bonner should be relieved as counsel. (Motion, at 3).

June 18, 1979 hearing before a federal magistrate, Mr. Bonner adverted to his motion to be relieved and stressed to the magistrate that he was in conflict with Mr. Moore on the ineffectiveness claim. (Transcript of June 18, 1979 Hearing, 26-27).

Subsequently, the federal magistrate took no action, either on Mr. Moore's *pro se* motion to amend or on Mr. Bonner's motion to be relieved. Instead, following the untimely death of Hon. Alexander Lawrence, *see* 48 U.S.L.W. 2220 (Sept. 25, 1979), the case languished for over a year until a new federal judge had been assigned.

Before that assignment had been announced, however, on September 30, 1980, a new volunteer attorney, Diana Hicks, entered her appearance on behalf of Mr. Moore. The next day, October 1, 1980, Ms. Hicks filed a proposed amended habeas corpus petition. (J.A. 121-138). The petition sought to present the *Gardner* claim that had been adjudicated by the state habeas court. (J.A. 128-129). In an accompanying brief, Ms. Hicks argued that the merits of the *Gardner* claim had not been fully or adequately adjudicated in the state court, since that court had relied principally upon the untested Rachels affidavit and since the state court had failed to make full factual findings. (Memorandum, dated October 23, 1980, 9-12).

When she learned about the assignment of the case to a new district judge, Ms. Hicks wrote stating her intention to challenge the effectiveness of Mr. Moore's trial counsel—including his performance at the sentencing phase—as soon as she had fully exhausted state remedies on the claim. (Letter of November 5, 1980).

Before these steps had been completed, however, on April 29, 1981, the District Court entered an order granting relief on one of the claims asserted by Mr. Moore in his original federal petition. *Blake* v. *Zant*, 513 F.Supp. 722 (S.D. Ga. 1981).[4]

[4] The District Court concluded that the trial judge had imposed Mr. Moore's death sentence in reliance on an idiosyncratic, nonstatutory aggravating circumstance, and that the Georgia Supreme Court had erred by failing adequately to review his sentence. 580 F.Supp. at 811-817.

Simultaneously, the District Court denied both (i) Mr. Moore's *pro se* motion to amend and (ii) Mr. Hicks' motion to amend, adding the *Gardner* v. *Florida* claim. The Court stated that it found "no sound reason for permitting further amendment at this late stage of the present case," suggesting that to do so "would only promote delay and confusion." *Id.* at 805-806.

On appeal, a panel of the Court of Appeals affirmed the District Court's grant of sentencing relief to Mr. Moore, albeit on a different ground—that the trial court had improperly relied on a nonstatutory aggravating circumstance. *Moore* v. *Balkcom*, 709 F.2d 1353, 1365-1367 (11th Cir. 1983).[5] Following this Court's decision in *Zant* v. *Stephens*, 462 U.S. 862 (1983), however, the panel withdrew its initial opinion and substituted another, denying relief. 716 F.2d 1511 (11th Cir.), *reh'g denied*, 722 F.2d 629 (1983). This Court denied certiorari on March 3, 1984. *Moore* v. *Balkcom*, 465 U.S. 1084 (1984).

III. The Second Federal Petition

A. Proceedings In The District Court

On May 11, 1984, Mr. Moore filed a second state habeas corpus petition, asserting not only the ineffective assistance and the *Gardner* claims which he had sought to have adjudicated in his first petition, but also several claims based upon constitutional developments that had occurred since his first state petition had been filed in 1978. Among these new claims were allegations: (i) that Probation Officer Rachels' interrogation of Mr. Moore violated the principles established by this Court's 1981 opinion in *Estelle* v. *Smith*, 451 U.S. 200 (1981); and (ii) that the failure of Georgia law to provide for confrontation and cross-examination of presentence report witnesses was contrary the Eleventh Circuit's 1982 opinion in *Proffitt* v.

[5] The panel also denied Mr. Moore's cross-appeal from the District Court's denial of his motions to amend the federal petition. The panel concluded simply that the District Court's decision denying Mr. Moore's proposed amendments had not been an abuse of discretion. 709 F.2d at 1369.

Wainwright, 685 F.2d 1227 (11th Cir. 1982), *modified*, 706 F.2d 311 (1983). The Georgia courts denied relief, finding that these claims either had been or could have been raised in Mr. Moore's first state petition. (Federal Petition, Appendix G).

On May 18, 1984, Mr. Moore asserted these claims in a second federal habeas petition. (J.A. 154-188). Three days later, the District Court held a hearing on abuse of the writ. On May 22, 1984, the District Court entered a 37-page order dismissing the petition without reaching the merits of any of Mr. Moore's claims. (Pet. for Cert., A2-34). That order is described in subdivision B below.

A divided panel of the Court of Appeals initially affirmed the dismissal, adopting the opinion of the District Court *in toto*. (*Id.*, 1-34). The full Court of Appeals, however, after rehearing the case *en banc*, affirmed in part, reversed in part, and remanded to the District Court for further proceedings. (Pet. for Cert., A46-120). *Moore* v. *Kemp*, 824 F.2d 847 (11th Cir. 1987) (en banc). That opinion is described in subdivision C.

This Court granted the State's petition for certiorari on April 18, 1988. 56 U.S.L.W. 3718 (U.S., April 19, 1988) (No. 87-1104).

B. The Opinion Of The District Court

Virtually all of the claims presented in Mr. Moore's second federal petition raise questions about the factual accuracy and integrity of Moore's capital sentencing proceedings. The District Court below acknowledged that Mr. Moore's claims—especailly those related to the accuracy of Clark Rachels' "case study"—caused

> this Court to hesitate, for if attorney Pierce did fail to scrutinize the report, then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information.

(Pet. for Cert., A26). Distinguishing *Strickland* v. *Washington*, 466 U.S. 668 (1984), on this score, the District Court

found that "corrected information would have materially altered the [sentencing] profile before the [trial] judge." (Pet. for Cert., A67).

Despite these material errors in Mr. Moore's sentencing trial, the District Court did not grant habeas relief, because it concluded that Moore's constitutional claims constituted an abuse of the writ. In reaching that judgment, the District Court first reviewed the law governing the disposition of successive federal petitions. (Pet. for Cert., A7-A12). It noted the broad discretion vested by Congress in the district courts to dispose of successive habeas claims, citing *Sanders* v. *United States*, 373 U.S. 1, 18 (1963). It then indicated that its own view of the appropriate *scope* of its discretion had been clouded by then-recent pronouncements by other habeas courts; in particular, it pointed to this Court's opinions in *Woodard* v. *Hutchins*, 464 U.S. 377 (1984), and *Antone* v. *Dugger*, 465 U.S. 200 (1984), as well as the Fifth Circuit's opinion in *Jones* v. *Estelle*, 722 F.2d 159 (5th Cir. 1983) (en banc). (*Id.* A12-A13).

After further examination of these cases, the District Court declared that it would henceforth adopt a new standard under which "exhaustion' (*Rose*) and 'procedural default' (*Engle*) case law analysis [would be] intermixed in [its] . .]. 'new law' abuse-of-writ analysis." The Court announced that "the analysis of the 'new law' claims found in the procedural default cases (*Engle*) constitutes an appropriate basis for evaluation of the *Estelle* v. *Smith* 'new law' claim." (Pet. for Cert. A21).

Applying this new "procedural default" analysis, the District Court concluded that Moore's *Estelle* v. *Smith* and his *Proffitt* v. *Wainwright* claims must be denied, since Mr. Moore, like "the state prisoners [in *Engle* v. *Isaac*, should be] held to have possessed the constitutional tools' to anticipate and argue the 'new law' claim[s] . . . ." (*Id*, A21; A28-A29).

The District Court then turned to Mr. Moore's *Gardner* v. *Florida* claim. Although noting that Mr. Moore's volunteer habeas attorney, Diana Hicks, had sought to include the claim in her amended federal petition some seven months before

Moore's first federal petition was decided, the court nonetheless concluded that "repeated opportunities to litigate this issue have been provided in this case," and declined to reach the merits of the claim. (Pet. for Cert., A27). The District Court also rejected, on procedural grounds, Mr. Moore's ineffective assistance claim, finding itself "troubled by the virtually automatic claim, in habeas petitions, to ineffective assistance of counsel." (*Id.* A33).

C. The Opinion Of The Court Of Appeals

In his opinion for the Court of Appeals, Chief Judge Godbold did not quarrel with the board discretion vested in the lower court by Rule 9(b). Instead, he reasoned that the District Court, by announcing a new "procedural default" standard, had employed an inappropriate legal premise to guide the exercise of its discretion. The majority wrote that

> Rule 9(b) allows dismissal of a claim when the failure of the petitioner to assert those grounds in the prior petition constituted an abuse of the writ.' *Accord* 28 U.S.C. § 2244. The focus on petitioner's conduct is mandated by the basic purpose of the abuse of the writ doctrine—to enforce the equitable principle[] . . . that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seek.' *Sanders* v. *U.S.*, 373 U.S. 1, 17 (1963). An evaluation of a petitioner's conduct in omitting a claim from his first petition necessarily hinges on the petitioner's awareness of the factual and legal bases of the claim when the first petition was filed.

(Pet. for Cert., A52). The majority went beyond Rule 9(b), however, by holding that Mr. Moore was

> chargeable with counsel's actual awareness of the factual and legal bases of the claim at the time of the first petition *and with* the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition."

(*Id.* A52-A53) (emphasis added).

After thoroughly assessing the state of the criminal and constitutional law at the time of Mr. Moore's initial federal habeas filing, the majority concluded that it could not charge Moore in 1978 with the knowledge of the legal bases either of the *Estelle* v. *Smith* claim, (*id.* A53-A59),[6] or of *Proffitt* v. *Wainwright*. (*Id.* A60-A61).

Turning to Moore's allegations under *Gardner* v. *Florida*, the majority first noted the "unusual procedural history" of this claim, which *was* raised in Mr. Moore's first *state* petition, and which Ms. Hicks sought to amend into the first federal petition. (Pet. for Cert., A61). Although it declined to hold "that the district court . . . [had] erred in finding . . . an abuse of the writ" (*id.* A64), the majority emphasized that "[e]ven where abuse is found . . . a federal court should not dismiss, under Rule 9 . . . . if the 'ends of justice' require consideration of the claim on the merits." (*Id.*).

The Court of Appeals professed uncertainty over "what standards should guide a district court in determining whether the 'ends of justice' require . . . consideration on the merits" of an abusive claim. However, drawing upon (i) dicta by the plurality in *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986); and (ii) the "miscarriage of justice" analysis elaborated by this Court in another context in *Smith* v. *Murray*, 477 U.S. 527 (1986) and *Murray* v. *Carrier*, 477 U.S. 478 (1986)—the majority con-

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[6] The majority noted that: (i) there was a "lack of clear guidance in 1978 with respect to constitutional protections that might attach to the sentencing phase" of capital trials (Pet. for Cert., A53-A54); (ii) two of the three cases this Court cited in *Estelle* v. *Smith* were not decided until after 1978 (*id.* A54-A55); (ii) the Fifth Circuit subsequently held that trial counsel in *Gray* v. *Lucas*, 677 F.2d 1086 (5th Cir. 1982) was not ineffective for failing to anticipate the *Smith* holding in 1976; and (iv) because of the special problems created by uncounseled psychiatric interviews under Texas' unique "future dangerousness" sentencing statute, it was far from obvious that *Estelle* v. *Smith* had any application to the very different sentencing scheme enacted by the Georgia legislature. (*Id.* A57-A59).

cluded that, at a minimum, colorable claims of possible factual errors respecting a defendant's "factual innocence" might invoke the "ends of justice" exception. On that basis, the majority held that the District Court here should have an opportunity to reconsider the "ends of justice" issue in Mr. Moore's case:

> The [district] court found that the ends of justice did not require consideration of the *Gardner* claim on the merits. Yet its own statements arguably require the opposite finding. The court stated that if there had been a *Gardner* violation, then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information . . . [I]t is arguable that . . . corrected information would have materially altered the profile before the judge . . . .' Under these circumstances we vacate the denial of the *Gardner* claim and remand in order that the district court can give fresh consideration to whether the ends of justice require it to consider the merits of this claim.

(Pet. for Cert. A66-A67).

SUMMARY OF ARGUMENT

Zant's submission to this Court rests upon a major, unexamined assumption: that the federal courts are free to revise present habeas corpus standards, as they see fit, in order to regulate the disposition of second habeas petitions brought by applicants asserting "new law" claims. This critical assumption is demonstrably false. As Justice White noted in *Autry* v. *Estelle*, 464 U.S. 1301 (1983), Congress has "implicitly recognized[d] the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated," 464 U.S. at 1303, and the federal courts must adhere to Congressional intent.

A review of legislative history discloses that, during the past 40 years, Congress has repeatedly expressed its preference for a standard under which habeas petitions raising "new law" claims may be foreclosed *only* if an applicant has "deliberately withheld" the new claim or has been guilty of "inexcusable

neglect." Zant's present proposal to alter this standard is virtually identical to legislative proposals that have been presented to—and firmly rejected by—Congress on numerous occasions.

The Court of Appeals itself disregarded this Congressional decision by adopting a "reasonable attorney" standard, under which a district court may dismiss a second application *not only* if an applicant deliberately withholds a "new law" claim, *but also* if a reasonable attorney *should have* recognized and asserted the claim earlier. Even under this stricter "objective" standard, the Court of Appeals found that Mr. Moore was entitled to be heard on the merits of his *Estelle* v. *Smith* and *Proffitt* v. *Wainwright* claims. Although we submit that the Court of Appeals was wrong to alter the Congressionally-sanctioned standard, it was plainly correct in concluding that Moore could not have reasonably been expected to foresee either *Estelle* or *Proffitt*, and that he did not abuse the writ by invoking them in a second application. The "without legal foundation" standard—contrived by petitioner in a desperate effort to identify *some* test Mr. Moore might fail to meet—is utterly faithless, not only to Congressional will, but to the basic equitable principles that undergird the Great Writ.

Zant also faults the Court of Appeals for remanding Mr. Moore's *Gardner* claim to the District Court with directions to consider whether the "ends of justice" require resolution of that claim on the merits. Once again, Zant finds himself embarrassed both by the facts and the law surrounding this claim. As a procedural matter, Mr. Moore should not have been held to have abused the writ, since "[e]xcept for his failure to include the *Gardner* . . . claim[] in the document which initiated his first habeas proceeding," as Judge Kravitch noted below,

> Moore did all he could to have the claim litigated by the first habeas court. Accordingly, this is not an instance of "needless piecemeal litigation' nor is the purpose of the present petition 'to vex, harass, or delay.' Rather, having sought in vain to have his claims litigated in a single proceeding, Moore now seeks a decision on the merits

> regarding [a] . . . claim[] which the district court earlier refused to address.

(Pet. for Cert., A40).

Moreover, the substance of the *Gardner* claim strikes directly at the essential integrity of Moore's sentencing verdict. As both the District Court and the Court of Appeals agreed, the Probation Officer's presentation report appears marred by numerous material factual errors which raise a "sufficient likelihood . . . for finding that a wrongful sentence was imposed based on inadequate information." (Pet. for Cert., A36).

Even if the appropriate test of the "ends of justice" were limited to habeas cases in which "the alleged constitutional error . . . precluded the development of true facts []or resulted in the admission of false ones," *Smith* v. *Murray*, 477 U.S. 527, 538 (1986)—a question the Court does not have to resolve in this case—Mr. Moore would stand fully entitled to relief. He should not be dispatched to his death because of a presentence report, laced with serious errors, omissions, and misstatements that was (i) submitted by the State to the sentencing court in violation of Georgia law, (ii) not subjected to confrontation or cross-examination, (iii) made available to Moore and his trial counsel, if at all, not at the last minute, under circumstances affording no meaningful opportunity for review, and (iv) yet, plainly relied upon by the judge who imposed Moore's death sentence.

ARGUMENT

I THE COURT SHOULD DECLINE THE INVITATION BY THE GEORGIA ATTORNEY GENERAL TO CREATE NEW HABEAS STANDARDS THAT WOULD SUPERSEDE THE STATUTES AND RULES ENACTED BY CONGRESS

A. The Congressional Standard

Zant's submission to this Court is, at bottom, a plea for a major revision in habeas corpus law, to be accomplished via judicial decree. In Subdivision C below, we will show that, even

were the federal courts free to legislate new habeas rules, petitioner's proposed change would be unnecessary and unwise.

The first issue, however, is not the wisdom of Zant's proposal, but its unstated legal premise: that the decision to strike a new balance on successive habeas petitions is properly committed to the judiciary, not to Congress. The federal courts, of course, are not generally free simply to promulgate new substantive or procedural rules, heedless of the prior actions of the Congress. *See, e.g., United States*, v. *Locke*, 471 U.S. 84, 95 (1985); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). Only after they have assured themselves of their authority to change the law can they properly proceed to consider arguments for the desirability of doing so.

In the present case, the issue of judicial authority is controlling. Federal habeas corpus is a statutory remedy, and the history of Congressional enactments governing successive petitions—specifically, 28 U.S.C. § 2244, 28 U.S.C. § 2244(b), and Rule 9(b)—demonstrates that Congress has, definitely and repeatedly, rejected the new habeas standards Zant now urges the Court to adopt.

In *Autry* v. *Estelle*, 464 U.S. 1301 (1983), Justice White has written of the *desirability* of a new rule that would "require by statute that all federal grounds for challenging a conviction or a sentence be presented in the first petition for habeas corpus." 464 U.S. at 1303. Yet he refused judicially to *create* such a rule, because "historically, res judicata has been inapplicable to habeas corpus proceedings, *Sanders* v. *United States*, 373 U.S. 1, 7-8 (1963)," and because "28 U.S.C. § 2244 (a) and 28 U.S.C. § 2254 Rule 9 implicitly recognize the legitimacy of successive petitions raising grounds that have not previously been presented and adjudicated." 464 U.S. at 1303. The legislative history fully vindicates Justice White's position, and it is to that history that we first turn.

1. Congressional Intent: 28 U.S.C. § 2244

Congress initially provided for federal habeas corpus jurisdiction over state prisoners in 1867. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. The 1867 Act did not contain any provision directed explicitly to the question of successive petitions; it did contain a provision broadly empowering the federal courts to "dispose of the party as law and justice so require."

Just how broad a jurisdiction Congress originally contemplated under the 1867 Act has been subject to much debate, both in the scholarly community and in the courts. Indisputably, however, by the mid-1940's, the practical scope of the federal writ had expanded significantly.[7] The Court gave the Act a broad reading in five important cases decided during this period which addressed the successive petition issue: *Loisel* v. *Salinger*, 265 U.S. 224 (1924); *Wong Doo* v. *United States*, 265 U.S. 239 (1924); *Waley* v. *Johnston*, 316 U.S. 101 (1942); *United States ex rel. McCann* v. *Adams*, 320 U.S. 220 (1943); and *Price* v. *Johnston*, 334 U.S. 266 (1948).[8]

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[7] In 1938, the Court emphasized, in its seminal opinion in *Johnson* v. *Zerbst*, 304 U.S. 458, 466 (1938), that "Congress has expanded the rights of a petitioner for *habeas corpus* and the . . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice . . . a more searching investigation, in which . . . the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'".

[8] In *Loisel*, the Court ratified earlier federal cases that had constructed the 1867 Act "as meaning that each application is to be disposed of in the exercise of a sound judicial discretion, guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought." 265 U.S. at 231. Citing Justice Field's opinion in *Ex parte Cuddy*, Fed. 62 (1889), the Court held that principles of *res judicata* were inapplicable to successive applications, although "[t]he officers before whom the second application is made may take into consideration the fact that a previous application has been made . . . and refused.'" *Id.* In *United States ex rel. McCann*, the Court held that a lower court should not have dismissed a second habeas petition—brought by the relator after this Court itself had denied his first application—since the issue presented by the second application "was explicitly withdrawn from consideration on the habeas corpus proceedings previously before the Circuit Court of Appeals [and] . . . has never been adjudicated on its merits by the lower courts." 320 U.S. at 221.

Adams and *Price* are particularly significant, since they constituted authoritative declarations of the state of habeas law, and they were rendered only shortly before Congress enacted 28 U.S.C. § 2244—the first statutory provision governing successive petitions—as part of its 1948 codification of the federal judicial code. The House Judiciary Committee, in recommending the 1948 legislation, emphasized its intention that its proposed Section 2244 would "make[] no material change in existing practice." H.R. Rep. 308, 80th Cong., 1st Sess. A178 (1947).[9]

In *Wong Doo*, the Court identified the failure to come forward with available proof as "an abusive use of the writ," absent some "reason for not presenting the proof at the outset." 265 U.S. at 241. *Price* v. *Johnston* demonstrated the Court's resolve, however, that if an applicant *could* offer a sound reason, even—as did Price—in an amendment to his fourth habeas application, *see* 334 U.S. at 288, the federal courts should not summarily dismiss it:

> If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

334 U.S. at 291. The decision in *Waley* likewise reflects the Court's insistence that, when an applicant has an excuse for the failure to present the claim on an earlier application, a second petition ought not be denied. 316 U.S. at 105.

[9] The House Judiciary Committee was far from oblivious to the problem of abusive petition; on the contrary, it explicitly noted that "[t]he practice of suing out successive, repetitious, and unfounded

The Senate Judiciary Committee, acting pursuant to a proposal by the Judicial Conference, recommended a modification of the original language of proposed Section 2244 in order to emphasize that federal courts would retain the equitable power of the federal court to entertain successive petitions. "The original language of the section," the Senate Committee feared, might be read to

> den[y] to Federal judges the power to entertain an application for a writ of habeas corpus where the legality of the detention has been determined on a prior application. The amendment [would] . . . modify this provision so that, while a judge need not entertain such a later application for the writ under such circumstances, he is not prohibited from doing so if in his discretion he thinks the ends of justice require its consideration.

S. Rep. No.1559, 80th Cong. 2d Sess 9 (1948).

Section 2244 as revised passed the full Senate and became law on June 25, 1948—less than one month after the Court's decision in *Price* v. *Johnston* had been announced.[10]

2. Congressional Intent: § 2244(b)

In the 18 years between 1948 and 1966, numerous attempts were made to change federal law to restrict federal habeas

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writs of habeas corpus imposes an unnecessary burden on the courts." H.R. Rep. 308, 80th Cong. 1st Sess. A178 (1947). Yet the Report noted that the current procedures were adequate to protect against abuses: "the courts have consistently refused to entertain successive "nuisance" applications for habeas corpus." (*Id.*)

[10] As enacted, § 2244 read:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

jurisdiction for state prisoners. Congress rejected all of them. Legislation specifically directed to 28 U.S.C. § 2244, for example, was proposed "in the 84th, 85th, 86th, and 88th, as well as [the 89th] Congress, . . . sponsored by the Judicial Conference of the United States." H.R. Rep. No. 1892, 89th Cong., 2d Sess. 3 (1966).

The most significant case law development during the period was *Sanders* v. *United States*, 373 U.S. 1, (1963), in which the Court set out in detail the principles that should govern district courts in the exercise of their discretion on second habeas applications. Unlike § 2244, which by its express terms governed only those successive applications raising constitutional claims *previously* adjudicated, the Court in *Sanders* also spoke to second applications that asserted *new* claims. The Court identified *Price* v. *Johnston* as such a case, distinguishing it from the earlier decision in *Wong Doo* as follows:

> Wong Doo was distinguished on the ground that there the proof had been 'accessible at all times' to the petitioner, which demonstrated his bad faith, 334 U.S. at 289; in Price, by contrast, for aught the record disclosed *petitioner might have been justifiably ignorant of newly alleged facts or unaware of their legal significance.*

373 U.S. at 10. (Emphasis added). Adhering to *Price*, the *Sanders* Court held that, "[n]o matter how many prior applications for federal collateral relief a prisoner has made," if another petition presents a claim that has not previously been adjudicated, "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ." 373 U.S. at 17. The Court reaffirmed that "abuse" was to be measured according to "traditional[] . . . equitable principles," *id.*, and cited the "deliberately withhold[ing] of one of two grounds for federal collateral relief . . . in the hope of being granted two hearings rather than one," 373 U.S. at 18, as exemplary of conduct that would disentitle an applicant to relief.

Finally, the Court held that "[t]he principles developed in" *Fay* v. *Noia*, 372 U.S. 391, 438-440 (1963) and *Townsend* v.

Sain, 372 U.S. 291, 317 (1963)—which demand proof of "deliberate[] by-pass[]" or "inexcusable neglect"—"govern equally here." 373 U.S. at 18. The Court made it

> very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard.

Fay v. *Noia*, 372 U.S. at 439.

The principles set forth in *Sanders* were employed regularly by lower federal courts 1963 until 1966, when Congress once again took legislative action. As in 1948, Congress acted in 1966 in response to a bill drafted by the Judicial Conference. H.R. Rep. No. 1892, 89th, Cong. 2d Sess. 3 (1966). The legislation added two subsections to § 2244, denominated (b) and (c). Subsection (b) provided that a second application, presented by a habeas petitioner whose previous application had been adjudicated on its merits, need not be entertained by a district court *unless* (i) the application was predicated on "a factual or other ground not adjudicated on the hearing of the earlier application," and unless (ii) the district court was "satisfied that the applicant had not on the earlier application *deliberately withheld the newly asserted ground or otherwise abused the writ.*" (Emphasis added).

The House Judiciary Committee explained that the purpose of this provision was to provide "for a qualified application of res judicata." H.R. Rep. No. 1892, at 8. The Senate Report, however, indicated just how "limited" an application of res judicata principles was intended when it identified, as the target of the revision, those "applications either containing allegations identical to those asserted in a previous application that has been denied, *or predicated upon grounds obviously well known to them when they filed the preceding application.*" S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966). The Senate Report attached a letter from the Committee on Habeas Corpus of the

Judicial Conference that had drafted the subsection, concurring that the intended targets of the provision were state prisoners who had used successive applications to present "additional grounds well known to them when they filed the preceding application." (*Id.*, 5).

Following Congressional enactment in 1966, this Court and the lower federal courts applied 28 U.S.C. § 2244(b), as suggested by the Senate report, to preclude only those successive applications that were deliberate or in bad faith. For example, in *Smith* v. *Yeager*, 393 U.S. 122 (1968) (per curiam), the Court held that inmate Smith's failure to request an evidentiary hearing during his initial federal proceeding did *not* constitute an abuse that would bar a hearing on the same claim in his second application. Noting that the standards for obtaining such hearings had been relaxed in the interval between the applicant's first and second applications, the Court hewed to the Congressionally mandated line:

> Whatever the standard for waver may be in other circumstances, the essential question here is whether the petitioner 'deliberately withheld the newly asserted ground' in the prior proceeding, or otherwise abuse the writ.' 28 U.S.C. § 2244(b) . . . [P]etitioner should [not] be placed in a worse position because his then counsel asserted that he had a right to an evidentiary hearing and then relinquished it. Whatever counsel's reasons for this obscure gesture of *noblesse oblige*, we cannot now examine the state of his mind, or presume that he intentionally relinquished a known right or privilege, *Johnson* v. *Zerbst*, 304 U.S. 458, 464, when the right or privilege was of doubtful existence at the time of the supposed waiver. In short, we conclude that petitioner's failure to demand an evidentiary hearing in 1961 . . . constitutes no abuse of the writ of habeas corpus.

393 U.S. at 125-126.[11]

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[11] The Justice Department in the post-1966 period, while disapproving the Congressional judgment embodied in § 2244, nevertheless plainly assumed that power to modify the standard lay with Congress. (*See, e.g., Speedy Trial: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92nd Cong., 1st Sess. 97-98 (1971).

3. Congressional Intent: Rule 9(b)

In 1976, Congress once again turned its attention to the appropriate standard to govern successive federal petitions, this time prompted by the Court's submission to Congress—pursuant to the "Rules Enabling Act, 28 U.S.C. § 2072 (1970)—of proposed Rules Governing Section 2254 Cases in the United States District Courts. *See* 425 U.S. 1165 (1976). Exercising its reserved authority under § 2072, Congress did *not* allow the proposed Rules automatically to become law. Instead, in response to sharp criticism from some quarters, Congress "voted to delay the effective date of the proposed rules . . . in order to afford itself the opportunity to review and amend the rules if necessary." Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Act*, 63 Iowa L. Rev. 15, 22 (1977). *See* Act of July 8, 1976, Pub. L. No. 94-349, 90 Stat. 822.

During House hearings in August of 1976, proposed Rule 9(b)—which was designed to address successive habeas petitions—became one of the chief foci of attention. Criticism centered on a phrase that would have permitted a district court to dismiss a second petition asserting "new or different grounds [if] the judge f[oun]d that the failure of the petitioner to assert those grounds in a prior petition is *not excusable*." (Emphasis added). Despite assurances by principal draftsmen of Rule 9(b), that this language was intended to leave the law "fully consistent with the applicable statutory provisions as to both 2254 and 2255 cases and with the Supreme Court decision in *Sanders* v. *United States*,"[12], other witnesses worried aloud that this language might constitute "a covert effort to change

[12] *Habeas Corpus: Hearings Before the Subcomm. on Criminal Justice of the Comm. of the Judiciary*, 94th Cong., 2d Sess. 101 (August 5 & 30, 1976) (statements of Judge Webster and Professor LaFave). *See also* Statement of Daniel Kremer for the National Association of Attorneys General ("The Committee [on Habeas Corpus] understands this subdivision to restate existing law (*see Sanders v. United States).*" Hearings, *supra*, at 47.

existing law by use of the rulemaking process," *id.* at 23, substituting an undefined standard for "the deliberate bypass" test enunciated in *Fay* v. *Noia*," and adopted in *Sanders*. (*Id.*, 24).[13]

In its ultimate report on the proposed Rules, the Committee on the Judiciary recommended changes in only four substantive provisions; Rule 9(b) was one of them. As it explained:

> The committee believes that the 'not excusable' language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition. The abuse of writ' standard brings rule 9(b) into conformity with existing law. As the Supreme Court has noted in reference to successive applications for habeas corpus relief and successive § 2255 motions based upon a new ground or a ground not previously decided on the merits, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading.' *Sanders* v. *United States*, 373 U.S. 1, 17 (1963). See also 28 United States Code, section 2244(b).

H. R. Rep. No. 94-1471, 94th Cong., 2d Sess. (1976). On September 28, 1976, Rule 9(b) was enacted into law. Act of Sept. 28, 1976, Pub. L. 94-426, 90 Stat. 1335.

In sum, Congress in 1976 firmly rejected language, proposed by this Court for inclusion in Rule 9(b), because of Congressional apprehension that such language might be interpreted (i) to justify a departure from the standards set forth in *Sanders*, and thus (ii) to afford the district courts "too broad a discretion to dismiss a second or successive petition." As the

[13] Professor Burt Neuborne expressed the concern that proposed "Rule 9(b) . . . authorizes dismissal of a habeas corpus petition (even if meritorious) if new and different grounds for relief in a second petition were not presented to the court in a prior habeas petition. As such, [proposed] Rule 9(b) . . . purports, for the first time in our jurisprudence, to introduce claim preclusion into the law of habeas corpus." Hearings, *supra*, at 82.

Court subsequently held in *Rose* v. *Lundy*, 455 U.S. 509, 521 (1982), Congress acted in 1976 to codify the principle set forth in *Sanders* v. *United States*.

Since 1976, there have been numerous proposals submitted to Congress to revise current law, restricting the ability of state prisoners to submit successive federal petitions. *See generally*, L. Yackle, *Postconviction Remedies* § 19 at 92 (1981); *id.* § 19, 26-27 (1986 Cum. Supp.). None have been successful.

B. Zant's Invitation: Declare A New Rule

Zant attempts to sidestep the force of this legislative history, and of the Congressional choice that it so plainly reveals, by characterizing his proposed change *not* as the judicial legislation that it plainly would be, but, more benignly, as a "clarification" of the abuse doctrine. (Pet. Br. 9). He portrays his proposed new standard as helpful "guidance . . . as to the standards federal district courts should utilize," (Pet. Br. 11), which is justified by the fact that "[t]he appropriate treatment to be given claims based on 'new law' is only briefly mentioned in Rule 9(b) itself," and "only fleetingly discussed in the Advisory Committee Notes to Rule 9(b)." (*Id.* 12).

Nothing could be further from the truth. The standards governing "new law" claims under *Sanders* and Rule 9(b) are not inchoate, awaiting further elaboration. The present rule represents a carefully considered Congressional choice, refined over a 40-year period, which balances finality interests against the interest of habeas applicants. Zant may heartily disapprove of the balance Congress has struck, but it is disingenuous for him to attribute the present state of the law to oversight or inattention.

Both the organized federal judiciary, through the Judicial Conference, and this Court, through the Rules Enabling Act, 28 U.S.C. § 2072, have participated throughout this period in a statutorily-sanctioned dialogue with Congress on the proper scope of the federal habeas writ. Zant now counsels the Court to circumvent these lawful channels, undo the work of Con-

gress, and declare its own standard. This is bad counsel, and the Court should firmly reject it.

Zant alternatively seizes upon an isolated reference in the Advisory Committee Notes to Rule 9(b)—which cites "a retroactive change in the law" as an example of a claim that does *not* constitute "deliberate withholding" or inexcusable neglect—to argue that Congress has failed to address the problem of *non*-retroactive changes, and that the Court should promulgate new habeas rules to cover such changes. (Pet. Br. 12).

Absolutely nothing in *Sanders*, in § 2244, in § 2244(b), or in Rule 9(b) suggests that the example cited in the Advisory Committee Note is other than illustrative. Different consequences simply do not flow, *as a matter of habeas corpus law*, from distinctions based upon the retroactively or nonretroactivity of new constitutional developments.[14]

Although Zant ignores the distinction, this Court has steadfastly honored the "basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978). "To allow otherwise would

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[14] In a proper context, of course, the Court may choose to consider whether a particular constitutional claim, *see e.g.*, *Allen* v. *Hardy*, ___ U.S. ___, 92 L.Ed.2d 199 (1986), or even constitutional claims generally, *see e.g.*, *Griffith* v. *Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 662-663 (1987) (Rehnquist, Ch.J., dissenting), should be given retroactive application to habeas applicants. But questions respecting the law of retroactivity are not presented by this case. Zant did not argue the retroactive/nonretroactive distinction below; arguments that Zant chose not to assert before the District Court, the panel, or the full Court of Appeals, nor to include in his petition for certiorari, should not be entertained by the Court. *See United States* v. *Taylor*, 56 U.S.L.W. 4744, 4745 n.6 (U.S., June 24, 1988); *Amadeo* v. *Zant*, 56 U.S.L.W. 4464 n.6 (U.S., May 31, 1988); *Arizona* v. *Hicks*, ___ U.S. ___, 94 L.Ed.2d 347, 357 (1987); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

confer on the judiciary discretionary power to disregard the considered limitation of the law it is charged with enforcing.'" *Bank of Nova Scotia* v. *United States*, 56 U.S. L.W. 4714, 4715 (U.S., June 22, 1988).

C. The Wisdom Of Zant's Proposed Standard

Even assuming that the federal courts were free to consider Zant's proposal on its merits, however, his arguments are unpersuasive. The "crisis" Zant describes to justify his proposed change is vastly overstated. He alleges that his proposed change is necessary to cope with the "greatly increasing numbers of successive applications by capital litigants," (Pet. Br. 9-10), who engage in "endless rounds of federal habeas corpus actions." (*Id.* 11). Zant reports that, despite this Court's admonition in *Woodard* v. *Hutchins*, 464 U.S. 377 (1984), "the district courts continue to tolerate piecemeal litigation, and more disturbingly are increasingly tolerating an entire second or even third round of post conviction proceedings that essentially revolve around the same basic issues." (Pet. Br. 10-11).

The explanation for such behavior by the district courts, according to Zant is their perplexity about "new law" claims: "[t]he federal district courts find themselves in a quandary in distinguishing between those situations in which legitimate claims are presented . . . from those claims which are simply new attempts to litigate old issues." (Pet. Br. 13).

What is the support for Zant's description of the current scene? Apart from his rhetorical flourishes, he offers no evidence to substantiate his charges. No doubt, the presence of 2000 capital inmates on the nation's Death Rows has increased the overall habeas corpus workload of the federal courts. Indisputably, many capital inmates, in the final weeks prior to their executions, attempt some last-minute legal proceedings to save themselves from execution. Yet over 80 executions have been carried out during the past five years;[15] each of those cases

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[15] *Death Row, U.S.A.*, NAACP Legal Defense & Educational Fund 3 (May 1, 1988)

demonstrates that the habeas process is far from "endless," and that federal courts, guided by this Court's opinion in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), are now routinely disposing of abusive habeas applications with dispatch. *See, e.g., McCorquodale* v. *Kemp*, 829 F.2d 1035 (11th Cir. 1987) (dismissing, in less than 24 hours, a successive petition raising "new law" claims); *In re Shriner*, 735 F.2d 1236 (11th Cir. 1984) (rejecting, on June 19, 1984, a successive petition filed in the District Court a day earlier). It is precisely the district courts' continuing ability, under the Congressional standard, to separate the meritorious from the frivolous case, the habeas 'wheat' from the 'chaff,' that demonstrates the serviceability of the modern equitable writ.

Zant's policy argument also faults the Congressional standard for its ostensible "makeshift subjective' test." (Pet. Br. 14-15). Congress indeed did decree that the inquiry on a successive petition should focus on the prior good or bad faith of the habeas applicant. There is nothing "makeshift" about this standard. Zant's real complaint is not that the standard is difficult to apply, but that, by his lights, too many habeas applicants assert "new law" claims that were not deliberately withheld on a prior application.

The attempt to use Billy Moore's case as a vehicle for attacking the Congressional standard is severely compromised, however, since the Court of Appeals itself (i) abandoned the Congressional standard, (ii) substituted a far stricter "objective" standard, and (ii) nevertheless held that Mr. Moore's claims met this heightened standard. Specifically, the majority opinion declared that a successive application on a "new law" claim may be denied *not only*—as *Sanders*, § 2244(b), and Rule 9(b) provide—if the applicant withheld a constitutional issue despite an "actual awareness of the factual and legal bases of the claim at the time of the first petition." (Pet. for Cert., A52-A53), *but also* if a "reasonably competent counsel at the time of the first petition" would have been aware of the claim. (Pet. for Cert., A53). This latter prong of the Court of Appeals' test

requires a district court to look beyond the subjective good or bad faith of the applicant to the knowledge of his counsel, and to determine, pursuant to an objective standard, whether a reasonable counsel *should have* foreseen and asserted the claim.

For the reasons identified earlier, we believe that the Court of Appeals seriously erred in adopting this objective, "reasonable counsel" standard. Yet the lower court's judgment should nevertheless be affirmed, since even under its rigorous standard, the Court of Appeals found that Mr. Moore was entitled to relief. Zant finds himself hard-pressed to explain the deficiencies of the Court of Appeals' standard, since it appears responsive to every policy concern he has asserted. The objective, "reasonable counsel" standard, indeed, seems closely modeled after this Court's standard for the consideration of "new law" claims in the procedural default context. *See Reed* v. *Ross*, 468 U.S. 1, 14-15 (1984); *Amadeo* v. *Kemp*, 56 U.S.L.W. 4460, 4463 (U.S., May 31, 1988). How can Zant seriously argue that a successive habeas applicant—whose claims are to be judged under equitable principles, with no comity interests at stake—should be subjected to a *stricter* standard than one appropriate for applicants guilty of procedural default—where comity interests are paramount, and where equity does not provide the governing framework for adjudication?

Zant's answer to this question is a confusing muddle. He variously refers to the lower court's "*subjective* test" (Pet. Br. 15) and to its "'foreseeability standard.'" (*Id.*). Either way, he claims,

> the 'foreseeability standard' in the context of an abuse of the writ case is dangerous in that it affords a way in which a petitioner can easily dismiss a properly pled assertion of abuse of the writ by merely stating that the legal principle now being asserted is a 'new claim' which was not foreseeable by counsel.

(Pet. Br. 15). This charge just won't wash. Unless a claim *is* new it can be quickly dismissed by any district court operating under the Court of Appeals' standard.

Having rejected both the Congressional standard and the more stringent Court of Appeals alternative, what finally does Zant propose as a replacement? His "workable test" would

> require that the applicant demonstrate by clear and convincing evidence that the belated claim is based on a legal foundation that did not exist at the time of the first federal petition, that this new legal foundation is not simply the product of natural development and constitutional updating in the law, and finally, that the asserted new legal foundation is in fact a substantial departure from prior legal precedent.

(Pet. Br. 18). The Court should look very carefully at this proposed test. Zant asks for "clear and convincing" proof that a legal change literally without precedent had occurred, one suddenly announced without any "legal foundation"—an opinion, in short, altogether foreign to the incremental methodology that is the hallmark of Anglo-American judicial decision-making and that, for over two centuries, has characterized this Court's approach to constitutional adjudication.[16]

It is hard to imagine *any* claim that might ever meet this standard; indeed, that seems to be the point. The radical nature of Zant's proposal reveals nothing more or less than

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[16] Such an approach would utterly transform the equitable foundations of the writ. The chief impetus for the entire development of an equitable jurisprudence in Anglo-American law was the need to mitigate "the rigid character, external and internal, which the common law soon assumed after it began to be embodied in judicial precedents," 1J. Pomeroy, *Treatise on Equity Jurisprudence* § 16, at 20 (5th ed. 1941). The Court, in fashioning its habeas jurisprudence in that spirit, has "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalism or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley* v. *Municipal Court*, 411 U.S. 345, 350 (1973). *Accord*, *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923). Kemp's standard, deeply hostile to the principle of equity, proposes to substitute an unyielding, inflexible prohibition for the broad discretion presently vested by Congress in the lower federal courts.

how extreme and senseless must be a standard that would undercut Mr. Moore's claims.

II JUDGED BY ANY REASONABLE STANDARD, MR. MOORE DID NOT ABUSE THE WRIT IN ASSERTING HIS CONSTITUTIONAL CLAIMS

A. Mr. Moore's *Estelle* v. *Smith* Claim

Zant does not contend that Mr. Moore deliberately withheld his *Estelle* claim, or that he acted with any "purpose . . . to vex, harass or delay." He nonetheless insists that the claim be dismissed as an abuse of the writ, for two reasons. *First*, he maintains that the claim is "[b]asically . . . an attack on the circumstances surrounding the compiling of the presentence report . . . . .]. [t]he contents . . . and the circumstances [of which] have been litigated throughout Respondent's post-conviction proceedings." (Pet. Br. 19). *Second*, he maintains that the *Estelle* claim constitutes an abuse of the writ.

Zant's first contention blends one part error with one part half-truth. The error is to confound the fundamentally different issues addressed by *Estelle* v. *Smith* on the one hand, and *Gardner* v. *Florida* on the other.[17] It is only by confusing or

[17] *Estelle* focuses upon the proper conduct of a State official who interviews a capital inmate to obtain information for use in the sentencing phase of a capital case. *Estelle* establishes that Fifth and Sixth Amendment protections surround an inmate in that encounter. *Gardner* regulates a completely different stage in the criminal process—the State's submission to a sentencing court of a presentence investigation report. *Gardner* declares the Eighth Amendment and Due Process rights of a defendant to fair notice and a meaningful opportunity to respond to that report. Although a violation of both *Estelle* and *Gardner* might occasionally occur in a single criminal proceeding—as here, where officer Rachel's flawed sentencing report is a product *both* of his earlier uncounselled interview with Mr. Moore *and* of his latter failure to afford Moore and his trial attorney an adequate opportunity to review his written report—it is quite possible to have a *Gardner* violation without an *Estelle* violation, or vice versa.

ignoring the constitutional principles at stake that Zant can argue that the two constitutional issues are essentially identical, or that a habeas applicant who has asserted one claim has thereby essentially been accorded habeas review on both.

The half-truth is Zant's suggestion that Mr. Moore's *Gardner* claim has "been litigated throughout." As we have seen, while Moore did attempt to amend his initial federal petition to assert this claim, the District Court denied that amendment; thus, no federal court has ever passed on its merits. Zant urges, in effect, that Moore's *Estelle* claim should be dismissed as redundant with *Gardner*, while elsewhere urging that *Gardner* be dismissed without ever having been adjudicated on its merits by any federal court.

Zant's second and principal argument, however, centers on his new "without legal foundation" standard. His application of that standard to Mr. Moore's case is highly instructive; it underlines just how radical a revision of successive habeas law petitioner has in mind. The Court of Appeals concluded, after exhaustive analysis, that *Estelle* had not been foreseeable to reasonable counsel in 1978. (*See* Pet. for Cert., A53-A59). Petitioner dismisses that conclusion as irrelevant, however: "The proper inquiry is not one of foreseeability," (Pet. Br. 22), but whether Mr. Moore can "prove by clear and convincing evidence that this belated claim is based upon a legal foundation that did not exist . . . [and] that this new legal foundation is not simply the product of natural development." (*Id.*). Since *Estelle* cited and "relied on the much earlier decision . . . in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) . . . [and] *In re Gault*, 387 U.S. 1 (1967)," (Pet. Br. 21), "there was no substantial departure from existing law . . . such as to provide . . . a legal foundation that did not exist at the time of the first petition." (*Id.*)

Although Zant's brief began by complaining of habeas applicants who deliberately and vexatiously abused the writ, he here proposes a remedy aimed at applicants free of any bad faith conduct. Under Zant's proposed rule, a habeas applicant

would not be able to avail himself even of decisions indisputably breaking new ground and making a life-or-death difference, so long as a State attorney general could discern *some* legal foundation for the decision, some case to cite for proof that, at least by analogy, it has a lawful pedigree.

The only instance we can think of in modern criminal or constitutional law that might qualify under Zant's new standard, if adopted, would be his new standard itself: it would be utterly unprecedented, without any equitable foundation, and unanticipated (even forbidden) by prior statutes and case law holdings. For just those reasons, it should be soundly rejected by the Court.

B. Mr. Moore's *Proffitt* v. *Wainwright* Claim

Zant faces, if anything, an even more difficult problem urging the dismissal of Mr. Moore's *Proffitt* v. *Wainwright* claim. In that 1982 decision, the Court of Appeals held that a capital defendant has the right to confront and cross-examine respondents who were quoted or relied upon in a pre-sentencing report. Not only did *Proffitt* extend these guilt-phase protections for the first time to the sentencing phase, but it placed qualifications on the previous routine use of pre-sentencing reports. As the Court noted in *Gardner* v. *Florida*, 430 U.S. 349, 355-357 (1977), an important 1949 decision, *William* v. *New York*, 337 U.S. 241, 245-251 (1949), squarely held that a defendant's rights to cross-examination and confrontation did not extend to presentence reports, and lower courts had uniformly adhered to that holding.

Furthermore, in *Gardner* itself, the Court stopped short of holding that a defendant could insist on confronting respondents quoted in a presentence report; as the Court of Appeals observed in *Proffitt*, "[t]he holding in *Gardner*, narrowly viewed, simply prohibits the use of secret information'; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to the sentencing tribunal." 685 F.2d at 1254. It is in light of this history that the *Proffitt* court concluded that it was addressing "an issue of first impression in this Circuit." 685 F.2d at 1253. Even the dissenting members of the Court of Appeals in Moore's case acknowledged that "the law in this field was in a state of disarray," when Mr. Moore filed his initial federal petition. (Pet. for Cert., A107).

Under these circumstances, Mr. Moore's failure to include the *Proffitt* claim in his initial federal petition was neither deliberate nor inexcusable; nor was the claim even "foreseeable" in 1978 under the majority's objective, "reasonable counsel" standard. (*See* Pet. for Cert., A60-A61). Only measured by petitioner's "without legal foundation" standard could the Court of Appeals be faulted for directing the District Court to proceed to the merits of this claim.

C. Mr. Moore's *Gardner* v. *Florida* Claim

Unlike his *Smith* and *Proffitt* claims, Mr. Moore's contention that Officer Rachel's presentence report was submitted to the trial judge in violation of *Gardner* v. *Florida* is not a "new law" claim: its constitutional basis had been judicially recognized prior to Moore's 1977 state habeas filing. Moreover, the claim was included in Moore's state habeas petition and addressed on its merits by the state habeas court in 1978.

Ordinarily, then, the Court might anticipate that Mr. Moore, in this second federal petition, would be seeking to *relitigate* this claim. Under such circumstances, 28 U.S.C. § 2244(b) and Rule 9(b) would govern; they provide that such an application "need not be entertained," unless, as *Sanders* v. *United States* holds, "the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15. It is just such an "ends of justice" issue that was presented in *Kuhlmann* v. *Wilson*, 447 U.S. 436 (1986).

What sets this case apart, however, is that Mr. Moore *does not* seek here a second federal adjudication of his *Gardner* claim, but rather a *first* federal review. Although *Gardner* was

not initially included in Moore's federal petition, after voluntary counsel Bonner abandoned the case in midstream, Mr. Moore subsequently managed to obtain a new attorney who *did* attempt to set the *Gardner* claim before the District Court, some seven months prior to its 1981 decision on his initial petition.

Proper consideration of his *Gardner* claim, therefore, begins with the basic equitable standard articulated by this Court in *Price* v. *Johnston* and *McCann* v. *Adams*, and embodied by Congress, as we have shown above, in § 2244(b) and Rule 9(b). That standard, *Price* teaches, does not call for a rigid rule of forfeiture, but looks to the conduct of the applicant and to the surrounding circumstances on the previous application:

> [I]f for some justifiable reason [a habeas applicant] was previously unable to assert his rights . . . it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Price v. *Johnston*, 334 U.S. at 291.

The District Court here did not reach the merits, but held the claim to be an abuse. To support its conclusions, it (i) quoted its earlier opinion, which had denied leave to amend in 1981 (Pet. for Cert. A23-A24); (ii) suggested that Mr. Moore was bound by Mr. Bonner's initial federal filing unless Bonner's performance was defective under the Sixth Amendment standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984) (*see* Pet. for Cert., A24-A27); and finally, (iii) cited Mr. Moore's *pro se* motion to amend, adding the ineffectiveness claim, as evidence of Moore's "capacity as a litigator" to "raise[] sophisticated claims," on his own behalf. (*Id.* A28 n.4).

The Court of Appeals—although remanding the *Gardner* claim for consideration of the "ends of justice"—held that it could not "say that the district court . . . erred in finding that the failure to include the claim in the first petition was an abuse." (*Id.*).

Neither of these opinions, we submit, correctly applied the standards adopted by Congress; neither took proper account of

the full range of relevant circumstances. In stark contrast to the habeas applicant in *Woodard* v. *Hutchins*, 464 U.S. 377, 379 (1984), who "offered no explanation for having failed to raise these claims in his first petition," Mr. Moore has identified at least six powerful factors that both explain and excuse his conduct.

First, Mr. Moore's initial attorney was an overworked, distracted volunteer attorney who in 1978: had "approximately one hundred and fifty cases." (J.A. 189). His 7-attorney office was handling 11 capital cases, (Motion to Withdraw, at 3), and had just been judicially appointed to represent "14,00 Georgia inmates in 56 different Georgia facilities." (Motion, at 1). Bonner has acknowledged that his "office did not routinely engage in factual investigation for state post-conviction clients," (J.A. 190), which forced him to rely totally on facial constitutional attacks rather than develop issues that required knowledge beyond the record. (J.A. 190-191). As a result, Mr. Bonner's omission of the *Gardner* claim is attributable, not to any strategic judgment, but instead to his ignorance of the crucial facts—"inaccuracies or omissions in the presentence report."

Second, shortly after he filed the federal petition, Mr. Bonner formally sought to withdraw, candidly informing the District Court that "the Petitioner's right to a full collateral review of his death sentence" might be "prejudiced by the responsibilities . . . which have fallen upon his present counsel," if he continued as Moore's attorney. (Motion to Withdraw, at 3).

Third, Mr. Moore, untutored in law, did what he could to develop a record by filing a *pro se* motion to amend his federal petition. The District Court's conclusion that Moore's clumsy effort to stitch together, from other inmates' pleadings, an ineffectiveness claim somehow renders him a "sophisticated" litigator who should have appreciated the constitutional significance of a *Gardner* claim is unfounded on this record.[18]

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[18] Ironically, the District Court elsewhere expressed its ire at the "virtually automatic claim, in habeas petitions, to ineffective assistance of counsel." (Pet. for Cert., A33).

Fourth, when new volunteer counsel, Diana Hicks, did enter the case—seven months before the District Court ruled on the first petition—her behavior on Moore's behalf was exemplary. She immediately moved to amend to assert the *Gardner* claim, filed a brief explaining why the claim should be heard, rescued the case from its state of suspended animation which had followed tne untimely death of the initial district judge, prompted the District Court to reassign the case, and informed the new judge of her intentions respecting Moore's other claims. There has been no suggestion that either the District Court or Kemp suffered any prejudice from the delay between Mr. Bonner's initial federal filing and Ms. Hicks' motion to amend.

Fifth, both Moore's *pro se* motion and Ms. Hicks' motion to amend were denied by the District Court in the context of its grant of relief on another issue. Had the District Court's initial decision for Mr. Moore stood, it would have barred the State from ever resentencing Moore to death *see Blake (and Moore)* v. *Zant*, 513 F. Supp. 772, 814-818 (S.D. Ga. 1981). Relief on the *Gardner* claim, by contrast, would at most have sent the case back for further proceedings. The District Court's exercise of its discretion to deny the amendments under these circumstances hardly amounted to a finding that they should be barred under other conditions.

Sixth, under then-current principles of habeas adjudication, Moore would have been free in 1981 immediately to re-file these claims in a second petition with the District Court, *see e.g*, *Potts* v. *Zant*, 638 F.2d 727 (5th Cir. Unit B), *cert. denied*, 454 U.S. 787 (1981); *Paprskar* v. *Estelle*, 612 F.2d 1003 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980). He did not do so only because he had been given full sentencing relief by the District Court. *See Richmond* v. *Ricketts*, 774 F.2d 957 (9th Cir. 1985) (not an abuse of the writ to raise issues in a second petition when district court granted relief in initial petition on other grounds, depriving petitioner of any incentive to pursue other claims earlier).

On this cord, Judge Kravitch was surely correct in observing that Moore himself "did all he could to have the claims heard by the first habeas court." (Pet. for Cert., A40) (Kravitch, J., dissenting). As *Smith* v. *Yeager* shows, the lower courts here simply should not have saddled Moore with Mr. Bonner's omission of the *Gardner* claim from the initial petition. In *Smith*, the Court refused to attribute an attorney's *unexplained* failure to request a hearing to his habeas client, or to conclude that counsel's failure constituted a deliberate waiver of federal claims. 393 U.S. at 126. Yet here, the lower courts held Mr. Moore responsible for Mr. Bonner's omission, despite Bonner's well-documented explanation to the District Court that he was operating under circumstances that threatened the very sort of inadvertent prejudice to Mr. Moore's rights that subsequently occurred.

A holding that Mr. Moore did not abuse the writ would not only vindicate the Court's precedents; it would reaffirm sound Congressional policy as well, by rewarding precisely that conduct which petitioner purports to desire—the presentation of all available claims in an initial federal proceeding. To hold, on the other hand, that an unsuccessful attempt to amend should be treated as an abuse will obviously discourage prompt amendment and, inevitably, increase litigation in successive applications over what an applicant's counsel actually knew or should have known about developing claims.

This Court, in short, should adhere to its traditional abuse principles which encourage good faith conduct and sanction only deliberate, vexatious or inexcusable attempts to delay. Such principles create an incentive for attorneys who enter a habeas case after a petition has been filed to do exactly what Mr. Hicks did here—immediately to bring all appropriate claims to the attention of the district court.

III THE ENDS OF JUSTICE REQUIRE THE CONSIDERATION OF MR. MOORE'S CONSTITUTIONAL CLAIMS ON THEIR MERITS

Sanders makes clear that a district court has the discretion —indeed the duty—to transcend any rule of forfeiture and

reach the merits of a constitutional claim should the "ends of justice" require it. 373 U.S. at 18-19. While the principle is firm, its application can prove uncertain, as the District Court's decision here demonstrates.

This Court has addressed related applications of the "ends of justice" principle in *Kuhlmann* v. *Wilson*, *Smith* v. *Murray* and *Murray* v. *Carrier*. The teaching of those cases is that, at a the minimum, a district court should entertain claims involving a colorable showing that the asserted constitutional violations have produced a wrongful result—whether the conviction of one who is factually innocent, *Kuhlmann* v. *Wilson*, 477 U.S. at 454 (plurality opinion); *Murray* v. *Carrier*, 477 U.S. at 496, or the imposition of a capital sentence based upon a constitutional error "which precluded the development of true facts [] or resulted in the admission of false ones." *Smith* v. *Murray*, 477 U.S. at 539. Federal district courts should, under those circumstances, reach the merits even if, as in *Smith* and *Murray*, the petitioner has failed to raise the claim properly in the state courts or, as in *Kuhlmann* the federal court has previously addressed the claim on the merits.

A fortiori, a district court should do so when, as here, an applicant for the writ has neither bypassed state procedures, nor withheld the claim during the initial proceeding, nor ever had a federal adjudication of his claim on the merits.

In this case the Court of Appeals followed the lead of *Smith* v. *Murray*, applying its test to errors in capital sentencing; it inquired whether the errors in Mr. Moore's case "precluded the development of true facts . . . or resulted in the admission of false ones." [quoting 477 U.S. at 538]. It concluded that there was a "fundamental inconsistency in the decision of the district court since that court had held that the asserted constitutional violation "would have materially altered the profile before the judge." (Pet. for Cert., A65-A67).

Since Moore's case meets this most exacting standard, the decision of the Court of Appeals remanding the *Gardner* claim to the District Court for its reconsideration should be affirmed. Zant makes no responsive argument to the contrary. He does

assert that *Smith* v. *Murray* differs from the instant case by implicating issues of "comity between sovereigns" which are not presented here. (Pet. Brief pp. 28-29).

We agree. The approach articulated in *Smith* v. *Murray* resolves the tension between three sets of considerations—finality, constitutional vindication, and federalism—and advances the state's interest in compliance with its orderly procedures as well as the more general interest in finality. Second habeas petitions implicate the latter concern—finality—but not the former. Even the finality interest is contingent, since Rule 9(b) expressly permits a federal court, in the exercise of its discretion, to entertain a petition which can be characterized as abusive. For all the reasons adduced in part II (C), *supra*, these considerations call for a more generous test for the "ends of justice" than that which applies to procedural default, not a more grudging one.

Once again, Zant's extreme arguments underline the great difficulty of fashioning a standard of justice which Moore *cannot* satisfy. Unlike *Smith* v. *Murray*, the constitutional errors in Mr. Moore's case indisputably "precluded the development of true facts" and "resulted in the admission of false ones." *Id.* at 538. The presentence report contained "evidence" which was (a) inaccurate and incomplete; (b) prejudicial; (c) material; and (d) relied upon. Confronted with this reality, the District Court concluded that ". . . if attorney Pierce did fail to scrutinize the report, then sufficient likelihood would exist for a finding that a wrongful sentence was imposed based upon inadequate information." Neither Zant nor any of the judges of the Court of Appeals has challenged this conclusion.[19]

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[19] Rather, the dissenters have dealt with the danger that Mr. Moore's death sentence is erroneous either by asserting that the underlying constitutional claim is conclusively without merit—a proposition we address below—or by proposing a test that precludes consideration of a successive petition unless the applicant can establish that his claims throw into question the aggravating circum-

Factual errors and omissions abound in Moore's case because he was sentenced under circumstances not materially different from those which prevailed prior to *Furman* v. *Georgia*, 408 U.S. 238 (1973). He was sentenced in July, 1974, two years before *Gregg* v. *Georgia*, 428 U.S. 153 (1976), three years before *Gardner*, four years before *Lockett* v. *Ohio*, 438 U.S. 586 (1978), seven years before *Estelle*, eight years before *Proffitt*, and ten years before *Strickland*. These cases are the building blocks of the post-*Furman* procedural revolution which has transformed capital sentencing from a virtual afterthought lacking substantive or procedural standards to an adversarial proceeding guided by Eighth Amendment standards.

Gardner, *Estelle*, *Proffitt* and *Strickland* transpose to the sentencing phase of a capital case protections long recognized

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stances necessary to authorize the imposition of a death sentence. This latter proposal finds no support in any decided case of this Court or any other judicial authority, nor should it.

Judge Hill proceeds as though *Kuhlmann*, *Smith* and *Carrier* limited the "ends of justice" test only to those cases in which the State is unable even to make out a *prima facie* case, rather than to cases where there is a credible claim of innocence. Judge Hill's test ignores the constitutionally significant difference between the existence of evidence sufficient to make out a *prima facie* case of capital murder and the existence of facts and circumstances which would lead a sentencer acutally to impose a death sentence. This Court has insisted repeatedly on the need for procedures which permit the sentencer to choose those who deserve death from among a far larger group who are eligible by statute to receive it. *See e.g.*, *Lockett* v. *Ohio*, 438 U.S. 586 (1978); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Johnson* v. *Mississippi*, ___ U.S. ___, 100 L.Ed. 2d 575 (1988). From *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), on, it has been clear that death cannot be the mandatory penalty for a range of crimes, and that it is the obligation of the State to fashion the appropriate combination of procedural and substantive rules to insure that the sentencer can meaningfully choose the few who should die from among the many who should not. At a bare minimum, when, as here, it is probable that a fully and accurately informed sentencer would be unlikely to choose death, the test for ends of justice has been satisfied.

as essential to the fairness of a guilt determination. They are essential precisely because they enhance the reliability of the factfinding and law application process. In the absence of such protections, the danger of aberrant results increases substantially. In Mr. Moore's case, the danger materialized, and an aberrant capital sentence resulted.

The individual who was presented to the sentencer—a man who had attempted to carry out the very crime in question on other occasions, a man who shot first rather than responsively, a man who had no current or past personal difficulties in mitigation of his apparently gratuitous crime, a man with an extensive juvenile record, a man whom the relevant community wanted to receive a sentence of death—was a caricature. He was not Billy Moore.

Zant alternatively asserts that this Court should find what neither the District Court nor the Court of Appeals was prepared to find—that the paper record in this case allows the *Gardner* claim to be dismissed as totally lacking in merit.[20] The courts below were correct—this record does not contain sufficient evidence or findings for any reviewing court to be in a position to resolve the merits of the *Gardner* dispute.

The only factual findings made by the state habeas judge are what the transcript shows. The District Attorney introduced Exhibit 27—the 72-page presentence reports that contained Officer Rachels' error-ridden "case study." He indicated that Mr. Pierce had received a copy of this document which he characterized as "a report that was made by the Probation

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[20] Kemp asserts in his brief that the District Court dismissed the *Gardner* claim in the second petition on the grounds that it was conclusively without merit. (Pet. Br. 27). This assertion is inaccurate. The language quoted in Kemp's brief comes from the District Court's 1981 decision, which merely denied leave to amend and was *not* a resolution on the merits. When the District Court in 1984 quoted its earlier opinion, it did not purport to transform that earlier opinion into an adjudication of the merits.

Officer, Mr. Clark Rachels, which included a crime lab report" in addition to "reports and letters" from Mr. Pierce." Mr. Pierce agreed, and asked that copies of certain warrants be placed into evidence as well. The state habeas court mentioned (but made no findings respecting) the Rachels' affidavit, in which Rachels averred that he had given the entire presentence report to Pierce on the morning of the sentencing hearing, and that Pierce had asked for a brief recess in which to review it.

Several crucial gaps in the factual record are evident; they must be addressed before there can be a resolution of the *Gardner* claim. *First*, there is no finding in this record that Hinton Pierce was aware that he was in possession of the "case study" (assuming that he was). There is no finding that he ever read it. The only evidence in this record points the other way. Both by affidavit to the Georgia Supreme Court and by live testimony under oath, Hinton Pierce insisted that he had never seen a probation officer's report of a presentence investigation in any Georgia case, and he had not seen the case study in this case. (J.A. 108-09)[21] Pierce's failure to make *any comment of any nature* about the report supports the "logically compelling inference," *United States* v. *Harris*, 558 F.2d 366, 376 (7th Cir. 1977), that he never read it. ". . . [T]here is no basis for presuming . . . that counsel could possibly have made a tactical decision not to examine the full report." *Gardner* v. *Florida*, 430 U.S. at 361 (plurality opinion). We suggest that he never read it

[21] Rachels asserted that Pierce showed the report to Moore in Rachels' presence and asked Moore if the "personal statement" (not otherwise identified but apparently the transcript of Moore's confession to the police) was accurate. (J.A. 106) This account seems implausible. If Pierce had been aware that he had been given the results of a confidential "case study," it makes no sense that neither he nor Moore noticed the numerous inaccuracies concerning Moore's marriage, his financial circumstances, his juvenile record, and the circumstances of the crime. It is more plausible to conclude that Pierce, on July 17th, did not see or examine the Rachels "case study" amid the larger, 72-page report.

because he never realized that he had it. On the record as it now stands, there is no way of knowing.

Second, the record does not contain evidence as to whether Pierce, if he did have the case study, was afforded a meaningful opportunity to review and comment upon it. There is no finding on this point, and what little evidence there is points toward the lack of any meaningful opportunity. Rachels asserted that after he provided the presentence report to Pierce on the morning of the sentencing hearing, Pierce requested a brief recess. (J.A. 106). No request for a recess appears on the record. The entire trial (J.A 18-72) was completed in time for Judge McMillan to take a recess for lunch and schedule closing arguments for 2:00 p.m. This sketchy data suggests that Pierce could not possibly have had sufficient time to carefully review the seventy-two page document, identify the case study, read it, discuss it with Moore, and decide how to respond. *United States* v. *Robin*, 545 F.2d 775 (2d Cir. 1976) (receiving lengthy presentence report on the morning of sentencing provides inadequate opportunity in guilty plea case); *Barclay* v. *State*, 362 So.2d 657 (Fla. 1978) (when record does not reveal the existence of a meaningful opportunity to examine and comment, remand is required); *State* v. *Phelps*, 297 N.W. 2d 769 (N.D. 1980) (thirty minutes is inadequate).

Third, there is no finding that Mr. Moore saw the case study. There is no evidence in the record to support such a finding. Mr. Moore testified that he had never seen the report. (State Habeas Transcript, at 18). Logic again supports his assertion —it passes belief that the grossly misleading "rap sheet," at least, would not have caught his eye and elicited his protest. The right involved here is that of Mr. Moore, and not his counsel. *Gardner* v. *Florida*, 430 U.S. at 361. There is nothing in the record to suggest that he waived it.

To the extent that it is possible to piece together a coherent story from these fragments of evidence, the tale that emerges is one of constitutional violation, not vindication. The Circuit

Court correctly concluded that this case must be remanded to the district court in order to resolve these issues.[22]

Where this Court were to reverse the Court of Appeals' disposition of the *Estelle* and *Proffitt* claims and rule that the effort to raise them was an abuse of the writ, those claims would require identical treatment. Many of the factual inaccuracies reported in the Rachels "case study" are apparently attributable to Rachels' interview with Moore, conducted in violation of *Estelle*. None of the evidence contained in the case study was presented in open court by witnesses under oath and subject to cross-examination. Were there a reversal, the District Court should still decide whether the ends of justice mandate full consideration of these claims.

---

[22] There is no question but that Mr. Moore suffered a fundamental violation of his due process and Eighth Amendment rights, *Townsend* v. *Burke*, 334 U.S. 736 (1948); *Johnson* v. *Mississippi*, 100 L.Ed.2d 575 (1988). The only question is exactly how such errors occurred. Under these circumstances, any remand should also direct the District Court to consider the possibility that Mr. Moore received the ineffective assistance of counsel. As the Eighth Circuit observed in a comparable situation, "If the report is untrue, and if there was no opportunity afforded Ryder or his attorney to rebut the inaccuracies, the sentence may be invalid . . . If, on the other hand, Ryder's attorney failed to avail himself of opportunities to discover the substance of the report, and to develop and present rebuttal material, either at the sentencing hearing, or to advise Ryder of the necessity of presenting exculpatory evidence, it is possible that Ryder received ineffective assistance of counsel." *Ryder* v. *Morris*, 752 F.2d 327, 332 (8th Cir. 1985).

CONCLUSION

The judgment of the Court of Appeals should be affirmed, or alternatively, the Court should modify the judgment, holding that Mr. Moore did not abuse the writ with respect to any of his constitutional claims.

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No. 87-1104

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vs.

WILLIAM NEAL MOORE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, in which respondent admitted committing a capital offense. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF ARGUMENT

The expansion of habeas corpus as an instrument of collateral attack is a creation of this Court, and the writ can be retracted by this Court without impairing in any way the historical writ guaranteed by the Constitution.

The considerations underlying *Wainwright v. Sykes* regarding state procedural bars apply with equal force to failure to raise an issue on the first federal petition. The cause and prejudice test should be adopted. A claim that a change in the law constitutes cause under that test is inherently inconsistent with the contention that the change is retroactive on habeas corpus. In the present case, this inconsistency exists under either of the two views of retroactivity.

ARGUMENT

A. Habeas corpus as an instrument of collateral attack is at best a distant relative of the historical "Great Writ."

Suggesting that habeas corpus be limited, as we will below, invariably produces a vehement reaction. "Any murmur of dissatisfaction with [collateral attack on convictions] provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would

cheerfully desecrate the Ark of the Covenant." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 142 (1970). Before turning to the particular question at hand, then, it may be best to note a frequently overlooked aspect of the writ. Habeas corpus as we know it is vastly different from the procedure on which Blackstone heaped his famous praise. See 3 W. Blackstone, *Commentaries* 129-138 (1768). The historical writ of habeas corpus ad subjiciendum was solely a remedy for illegal detention and could not overturn a conviction of a crime entered in a competent court. Today's writ of collateral attack, in contrast, nearly always questions a judgment of a court of unquestioned jurisdiction.

The common law writ was usually issued to free a person summarily imprisoned by the executive, although summary judicial imprisonments were sometimes involved. See, e.g., *Bushell's Case,* 124 Eng.Rep. 1006 (1670). A conviction by a court of *limited* jurisdiction might be questioned as to jurisdiction, but the writ was denied if the prisoner was in custody for conviction of a crime by a court of competent jurisdiction. See 3 Blackstone, *supra*, at 132 (piracy conviction in admiralty unquestionable). The Great Writ was simply unavailable for collateral attack on such a judgment.[1]

The writ was brought to America and incorporated in our Constitution. U.S. Const. art. I § 9. The first Congress ex-

1 *Bushell's Case, supra*, is not to the contrary. Bushell had not been convicted of a crime. He was jailed for contempt. 124 Eng.Rep. at 1006.

pressly granted the federal courts power to issue the writ. Judiciary Act § 14, 1 Stat. 81 (1789). The common law limitation remained, however. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830).

The limitation recognized in *Watkins* remained unchanged and was generally understood to be in force in 1867. In that year, Congress extended the federal writ to state prisoners detained in violation of federal law, but gave no indication that it intended to change the *Watkins* rule. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv.L.Rev. 441, 474-77 (1963).

The development of habeas corpus as a device to relitigate convictions of crime already decided by courts of competent jurisdiction was entirely a judicial invention. It began with the idea that the imposition of both fine and imprisonment, under a statute authorizing only one or the other, was beyond the "jurisdiction" of the court. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873). It was further expanded with the holding that a federal court has no jurisdiction to try an "infamous" crime without an indictment. *Ex parte Wilson*, 114 U.S. 417, 429 (1885). The outer limit of nineteenth century collateral attack was reached in *Ex parte Siebold*, 100 U.S. 371 (1879). On the theory that an unconstitutional statute is absolutely void, it was held that the constitutionality of the statute creating the offense could be reconsidered on habeas. *Id.* at 376-377. The rule was still in force, though, that errors of procedure could not be collaterally attacked, even if they rose to constitutional stature. *In re Belt*, 159 U.S. 95 (1895) (validity of jury waiver

statute); *Matter of Moran* 203 U.S. 96, 105 (1906) (allegedly forced self-incrimination not "jurisdictional").

Inquiry into procedural error was made available in the twentieth century to meet an overriding need. Black defendants were being wrongfully convicted due to infection of the system by racial prejudice, and direct review by this Court was insufficient to correct the injustices. See Friendly, *supra* p. 3, at 154-55; Bator, *supra* p. 4, at 523. In *Moore v. Dempsey*, 261 U.S. 86 (1923), the petitioners had been convicted in a mob-dominated trial and the state corrective process had made no serious inquiry into the due process issue. *Id.* at 87-90; cf. *Frank v. Magnum*, 237 U.S. 309, 333-336 (1915) (state court carefully considered question and decided trial was not mob-dominated). Finally, in *Brown v. Allen*, 344 U.S. 443 (1953), the court addressed the merits of Black petitioners' jury discrimination claims, with only one Justice contending that the state court's resolution of the issue be accepted as final. *Id.* at 545 (Jackson, J., concurring).

The point of this abbreviated history is that the use of habeas corpus as a device to relitigate questions which were or could have been raised in the original trial and appeal is entirely a creation of this Court. The decision in *Brown v. Allen* was not compelled by the common law, the Constitution, or Congress, but only by this Court's need to deal with an urgent sociolegal problem. As the problem fades, so does the need for this massive intrusion on the finality of state judgments. Bator, *supra* p. 4, at 523-24. Like the Constitution itself, habeas corpus is not as an object of worship to be mummified and preserved unchanged, but rather a flexible doctrine which has been and can continue to be expanded *and contracted* to meet the needs of a changing nation. See *Stone v. Powell*, 428 U.S. 465, 482 (1976); see also

Wright, *Habeas Corpus: Its History and Its Future* (Book Review), 81 Mich.L.Rev. 802, 810 (1983).

B. This Court should adopt the *Engle/Reed* "tools to construct the claim" test for evaluating "new law" claims in successive habeas petitions.

The crux of this case is the standard to be applied by federal district courts when a prisoner who has previously been denied federal habeas relief files another petition with a new ground based on a purported change in the law since his first petition. While the law regarding state procedural defaults has developed since 1963, very little has been said about successive petitions. This Court has not had occasion to provide guidance, and the few lower court cases have given the problem cursory treatment. See *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir. 1985); *Mays v. Balkcom*, 631 F.2d 52, 53 (5th Cir. 1980).

The lack of guidance for lower courts is evident from the split opinion below. The majority adopted a subjective test based on the petitioner's knowledge and conduct plus the knowledge of his attorney which is imputed to him. *Moore v. Kemp*, 824 F.2d 847, 851 (11th Cir. 1987). The majority then declined to impute to the petitioner knowledge of the availability of a claim unless failure to recognize the claim would have fallen outside the range of competent representation, borrowing the test of competence from *Strickland v. Washington*, 466 U.S. 668, 690 (1984). *Moore*, 824 F.2d at p. 854. Under the majority's test, then, the state can establish an *abuse* of the writ on a "new law" claim only by establishing the same degree of ineffective assistance on the first petition which, if it had occurred at trial, would *entitle* the petitioner to the writ under *Strickland*.

Judge Tjoflat, in dissent, adopted a test from a different line of cases. He found the situation more analogous to the procedural default cases. "If the petitioner possessed the ingredients of his claim (the facts and the law) but simply neglected to bring it in his prior petition, a federal court, pursuant to Rule 9(b), may decline to consider the claim." *Moore*, 824 F.2d at 862, n. 14. Cf. *Engle v. Isaac*, 456 U.S. 107, 133 (1982). Amicus submits that Judge Tjoflat is correct and that the majority is incorrect.

1. Fay v. Noia and Sanders v. United States.

The modern law of procedural default on habeas begins with a pair of cases decided several weeks apart in 1963: *Fay v. Noia*, 372 U.S. 391 and *Sanders v. United States*, 373 U.S. 1. *Fay* involved a claim of involuntary confession which was barred on state collateral review due to Noia's failure to appeal. After an extensive review of the history of habeas corpus, the Court concluded that "the jurisdiction of federal courts on habeas corpus is not affected by procedural defaults . . . during the state court proceedings," with the caveat that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts." *Id.* at 438.

Sanders involved a federal prisoner who had filed a second motion under 28 U.S.C. § 2255. The first petition had stated bare conclusions unsupported by facts and was dismissed. The case was arguably different from *Fay* in that it involved a federal prisoner, rather than state, and the default in question was failure to raise the point on the first collateral attack, rather than failure to object at trial or on direct appeal. See *Sanders*, 373 U.S. at 5-6.

The *Sanders* court identified two different "abuse of the writ" problems. One situation, the one involved in the case, involves an attempt to relitigate an issue contained in the previous petition, though perhaps not resolved on the merits. 373 U.S. at 15-17. The second situation involves the new claim. The Court decided not to "deal at length" with this issue and simply stated that *Fay v. Noia* and a companion case, *Townsend v. Sain*, 372 U.S. 293 (1963) "deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions govern equally here." *Sanders*, 343 U.S. at 18.

Thus the *Sanders* Court itself disclaimed any difference between presenting a new ground not raised in a previous federal petition and presenting a ground procedurally defaulted in the state system. Both situations balance the same opposing interests, finality versus opportunity to have the claim heard, and both are to be governed by the same standard.

Subsequent development in the law of state procedural defaults has caused the holding of *Sanders* to become ambiguous. *Sanders* can be read to hold that "deliberate bypass" is the standard, or it can be read to hold that the standard is the same as for state procedural defaults. The two are no longer the same.

2. The Cause and Prejudice Test.

Ten years after *Fay* and *Sanders*, the deliberate bypass standard set in those cases began to decline. In *Davis v. United States*, 411 U.S. 233 (1973), a § 2255 petitioner challenged as racially discriminatory the composition of the grand jury which had indicted him. Davis had not challenged the grand jury by pretrial motion, as required by Federal Rule of Criminal Procedure 12 (b)(2). The Court held that the rule was an express waiver provision enacted by Congress and therefore could not be defeated by permitting the waived claim to be raised on collateral attack. 411 U.S. at 242.

Davis emphasized the importance of raising the objection before trial in order to allow the trial judge to make the correction, if necessary. If the defendant makes a timely challenge, "inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial." 411 U.S. at 241.

In *Francis v. Henderson*, 425 U.S. 536 (1976), the Court was presented with a state prisoner seeking habeas in circumstances otherwise identical to *Davis*. The practical interests involved were the same. Prompt raising of the objection would have allowed prompt correction. The governmental interests, though, were quite different. The state procedural rule, unlike the federal rules, did not emanate from the same authority that had enacted the habeas statutes. On the other hand, a federal writ of habeas corpus for a state prisoner involves considerations of federal/state comity not involved in a § 2255 proceeding. Notwithstanding these differences, *Francis* adopted the *Davis* cause and prejudice test. *Id.* at 542. Although the *Francis* majority did not explicitly overrule *Fay*, despite a challenge from the dissent to state its position explicitly, *id.* at 546-47 (Brennan, J., dissenting), the result is clearly inconsistent with *Fay's* deliberate bypass standard.

The cause and prejudice test was extended beyond grand jury challenges in *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Petitioner had not objected at trial to the admission of a statement taken without *Miranda* warnings and had not raised the issue on appeal. Florida rules required the suppression motion to be made before trial in most cases. *Id.* at 76, n. 5. *Sykes* followed *Francis* and applied the cause and prejudice test to failure to object to a confession at trial. Unlike *Francis*, the *Sykes* court made its rejection of *Fay* explicit. *Id.* at 87-88, n. 12.

The *Sykes* court repeated the same practical considerations stated in *Francis* and *Davis*. A contemporaneous objection at trial is needed to identify, determine, and if necessary correct the problem and then proceed with the trial. *Id.* at 88-89. The *Sykes* court was also concerned with the possibility of "sandbagging." An objection might be withheld for the purpose of getting two bites at the apple. A defendant might be acquitted, or receive a light sentence, at the first trial. If not, and if reversible error is introduced and the conviction vacated years later, defendant will get a second trial on stale evidence. *Id.* at 89. A contemporaneous objection rule thus requires the defense to concentrate its energies on insuring that the first trial is free of error, not the opposite. *Id.* at 90.

In addition to the above considerations, the *Sykes* court discussed the idea that a procedural default is an independent state ground for the decision. A state may constitutionally require that an objection be raised at a certain point or waived, the argument goes, and thus the affirmance of the conviction rests on the adequate state ground of waiver, not the federal ground of the lack of merit of the objection itself. *Id.* at 81-82. If independent state grounds were really the basis of *Sykes*, though, the cause and prejudice test would not apply. The lack of a federal question is jurisdictional, not discretionary. See *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). If the state ground were, by itself, sufficient to support the judgment, federal courts would have no power to interfere, cause or no cause, prejudice or no prejudice. Because *Francis* and *Sykes* lay down a rule governing the judicious use of power rather than the limitations of power, see *Francis*, 425 U.S. at 538-39, the ground cannot be a jurisdictional one.

The cause and prejudice test was extended to a case involving neither federalism nor Rule 12(b) in *United States v. Frady*, 456 U.S. 152 (1982). Frady had been convicted of murder in the United States District Court for the District of Columbia.[2] Frady brought a § 2255 motion, claiming for the first time that the jury instructions had incorrectly defined "malice," *id.* at 157-58, n. 6, citing two cases decided four and seven years, respectively, after his trial, *ibid.*

The Court of Appeal held that the error had to be considered on a § 2255 motion if it met the "plain error" standard of Federal Rule of Criminal Procedure 52(b), the standard applied on appeal for most errors not objected to at trial. This Court reversed.

The *Davis* holding that rules on habeas could be no more lenient then those on appeal did not imply that they could be no more stringent. 456 U.S. at 164. While the *Davis* court had decided that the rules for preserving an objection for appeal established a floor for considering the issue on habeas, the *Frady* court rejected the contention that the ap-

2 The trial predated the establishment of a separate local court system for the District. *Id.* at 160.

pellate rules could establish a ceiling. Respect for finality of judgments permits the judicial creation of a standard for habeas higher than the one created for appeal by the rules. The cause and prejudice standard of *Davis, Francis,* and *Sykes* was held to be the proper balance between society's interest in finality and the petitioner's interest in belatedly asserting his claim. 456 U.S. at 166-67.

3. Defaults After Trial.

All of the cases from *Davis* to *Frady* had involved failure to object at trial. The primary open question remaining was whether the cause and prejudice standard also applied in the event of failure to raise an issue on appeal. This issue was addressed in *Reed v. Ross*, 468 U.S. 1 (1984). Ross had failed to object to a burden-shifting jury instruction at trial, but the state had no contemporaneous objection rule at the time. *Id.* at 7, n. 4. He also failed to raise the issue on appeal. The Court saw no reason to apply a different standard on that basis.

> This type of rule [requiring legal issues to be raised on appeal or waived] promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. To the extent that federal courts exercise their § 2254 power to review constitutional claims that were not properly raised before the state court, these legitimate state interests may be frustrated: evidence may no longer be available to evaluate the defendant's constitutional claim if it is brought to federal court long

> after his trial: and it may be too late to retry the defendant effectively if he prevails in his collateral challenge.

Id. at 10.

If any doubt remained that the same test applied for both trial and appellate defaults, it was eliminated in *Murray v. Carrier*, 477 U.S. 478, 490-92 (1986).

4. Successive Federal Petitions.

Looking at the cause and prejudice cases as a group, as charted in Figure 1, we see that only one common thread runs through all of them. In each case, the interest of the petitioner in having his claim heard must be balanced against the interest of the state in having the issue raised at

Figure 1
"Cause & Prejudice" Cases
Reasons for Procedural Bar

	Comity	Federal Rule	State Rule	Need for Trial Obj.	Finality
Davis		•		•	•
Francis	•		•	•	•
Sykes	•		•	•	•
Frady				•	•
Ross	•		•		•
Carrier	•		•		•

the earliest possible stage of the proceedings. While explicit federal and state rules are involved in most of the cases, only one case, *Davis*, actually involves a rule with a "cause" exception and none involve rules with an explicit "prejudice" requirement to invoke the exception. *Frady* does not involve any explicit procedural rule at all. The cause and prejudice standard is not based on a respect for procedural rules as such but on a recognition of the needs underlying these rules, a respect for the finality of judgments, and a belief that there must, at some point, be an end to litigation.

The interests to be balanced were neatly summed up in *Reed v. Ross*. "On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of constitutional rights of state prisoners . . . . On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments." *Reed*, 468 U.S. at 10. To determine whether the balance results in the same cause and prejudice test in the present case, we must examine both sides of this equation.

In one sense, the state's interest in enforcing procedural defaults grows weaker as the time after trial increases. There is a great deal of difference between avoiding retrial altogether, as objection at trial may do, and merely hastening the retrial, as an objection on appeal or on the first habeas petition may do. In another sense, though, the interest in finality increases with time. Society, the victim or next-of-kin, and arguably even the defendant need to have a final answer at some point. See *Mackey v. United States*, 401 U.S. 667, 690-91 (1971) (Harlan, J., dissenting). With each additional procedure that is permitted, that final day when all can say "it's over" is further postponed. We must, of course, accept direct appeal as a necessary delay and expense to guard against conviction of the innocent. Then there is state collateral attack. Then there is federal habeas. The frustration builds as attack after attack raises anew the possibility that a guilty person may escape justice and as the probability that the defendant is in fact innocent shrinks far below reasonable doubt into the infinitesimal.

Meanwhile the evidence for retrial grows more and more stale. Memories fade; witnesses die or disappear; physical evidence deteriorates or is lost. The ability to conduct a trial which is fair to society and to the victim, as well as to the defendant, decays with time. New trials are ordered on the theory, or at least the hope, that the second trial will determine the truth more reliably than the first. As time marches on that hope becomes a pipe dream.

The state's interest in having claims which were omitted from the first petition barred from consideration on subsequent petitions may be less than its interest in a contemporaneous objection rule in some respects, but it is greater in others. If all claims must be made in the first petition, absent cause and prejudice, most cases will have a definable end – the final disposition of the first federal petition. That is an important interest indeed. It is especially important in capital cases, where the execution of the sentence cannot begin until the end of proceedings is reached. See *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983).

On the other side of the coin is the petitioner's interest in a federal forum for his federal claim. This interest is far less compelling on successive petitions. Even if we assume the deep suspicion of state courts underlying this interest to be valid, it is one thing to say that the petitioner must be allowed entrance to the federal courthouse and quite another to insist that he has a right to take up residence

there. The cause and prejudice test merely requires the petitioner to show that he has a very good reason for not raising his claim earlier, see, e.g., *Amadeo v. Zant,* 56 U.S.L.W. 4460 (May 31, 1988) (evidence of intentional racism in jury selection concealed by the prosecution), and that the claim involves an error which really made a difference. Finally, there is the safety valve recognized in *Murray v. Carrier*, 477 U.S. at 496 for the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent."

The balance between finality and the federal forum thus tips at least as far in the government's favor in this case as it did in *Frady, Reed,* or *Carrier*, and the cause and prejudice standard is the appropriate one to apply.

5. Statutory Freezing.

The argument might be made that Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts has frozen the *Sanders* "deliberate bypass" test into place and precluded further development of the case law. Such a drastic change in role of the Court in defining the scope of habeas corpus would probably be within the power of Congress, but it should not be inferred without compelling evidence.

Rule 9(b) as originally promulgated by this Court provided for dismissal of successive petitions alleging new grounds if the failure to assert them earlier "is not excusable." See 28 U.S.C.A. § 2254, Rule 9 at 1136 (1977). Congress changed this language to "constituted an abuse of the writ." 90 Stat. 1334, 1335 (1976). The committee report stated the "not excusable" language gave too broad a discretion to the judge. H.R. Rep. No. 94-1471, reprinted

in 1976 U.S. Code Cong. & Admin. News 2478, 2482. The committee quoted *Sanders* and stated that the change brought the rule into conformity with the law. *Ibid.*

The inference is fairly drawn that Congress intended that the rules themselves not make any change in the law as developed in the cases. It does not follow, however, that Congress intended to preclude further case law development.

The language of *Sanders* and *Fay* was not written into the rule. Instead, the spacious and elastic phrase "abuse of the writ" was used. This phrase is far too vague and general to imply an intent to freeze the case law in place at the point where it happened to be at the time the rules were promulgated. The generality of the phrase is more consistent with an intent to allow the case law to develop unimpeded. That development points inexorably toward the adoption of the cause and prejudice test for all procedural defaults.

C. Only genuinely new rules are sufficiently novel to qualify under *Engle/Reed*.

Once the cause and prejudice test is determined to apply, we must turn to the question of whether cause exists. The clearest example of cause is intentional concealment of the factual basis of the claim by the prosecution. See *Amadeo v. Zant*, 56 U.S.L.W. 4460 (May 31, 1988). When the purported cause is a purported change in the law, the question becomes more difficult.

The issue of novelty of the argument as "cause" is bracketed by the decisions of this Court in *Engle v. Isaac*, 456 U.S. 107 (1982) and *Reed v. Ross*, 468 U.S. 1 (1984). Both cases involved claims that jury instructions had unconstitutional-

ly shifted the burden of proof of an element of the offense to the defendant. In *Engle*, the defendants claimed that lack of self-defense was an element of the crimes as defined by Ohio law and that once they showed evidence of self-defense the prosecution must prove its absence beyond a reasonable doubt. The trials had occurred several years after *In re Winship*, 397 U.S. 358 (1970). In the years between *Winship* and the trials in question, many defendants had relied on *Winship* to challenge instructions placing the burden of proof of particular issues on them. *Engle*, 456 U.S. at 131-33. The Court rejected the idea that failure to raise the claim had to sink to the level of ineffective assistance before it could be barred by the *Sykes* test. A claim need not be one that "every astute counsel" would have made before cause is found lacking. If a defendant does not lack the tools to construct the constitutional claim, novelty of the argument will not constitute cause for failure to comply with the state procedural rule. *Id.* at 133.

In *Reed v. Ross*, the jury in a murder case was instructed that use of a gun raises a presumption of malice shifting the burden of proof to the defendant. 468 U.S. at 6-7. The argument against this instruction would seem on its face to be considerably less novel than the argument advanced in *Engle*. Malice is traditionally an element of murder to be proved by the prosecution, while self-defense is traditionally an affirmative defense which many jurisdictions have required the defendant to prove. See W. La Fave and A. Scott, *Criminal Law* 45, n. 13, 48-49, n. 24, 528 (1972). The *Reed* court distinguished *Engle* by the fact that the trial in *Reed* had occurred before *Winship*. 468 U.S. at 19-20.

Novelty will constitute cause "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed*, 468 U.S. at 16. The most common

instance of a claim without a pre-existing "reasonable basis" is where "this Court has articulated a constitutional principle that had not been previously recognized *but which is held to have retroactive application.*" *Id.* at 17 (italics added). *Reed* then equates "not previously recognized" with the "clear break with the past" test. *Ibid.* This "clear break" language is taken from *United States v. Johnson*, 457 U.S. 537 (1982), where the Court indicated that "clear break" cases are "decisions whose nonretroactivity is effectively preordained." *Id.* at 553-54. The *Reed* court found that the pre-*Winship* authority was sufficiently sparse and that the practice of which Ross complained was sufficiently entrenched that the claim fell into one of *Johnson*'s three "clear break" categories. Therefore defense counsel had no reasonable basis to raise it at trial. 468 U.S. at 18-19.

The threads of retroactivity are woven throughout the fabric of *Reed v. Ross*. They show clearly in all three opinions. Justice Harlan had noted the connection fifteen years earlier, when he pointed out that retroactivity on habeas was not an issue until *Fay v. Noia*, 372 U.S. 391 (1963). *Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting). The *Reed* majority noted that retroactivity was a distinguishing characteristic of the primary category of cases to which its rule applied. 468 U.S. at 17. The majority also lifted its "clear break" test directly out of retroactivity law. *Ibid.* Justice Powell rested his deciding vote on the state's own procedural default in not raising the retroactivity issue. *Id.* at 20.

The dissent noted the paradoxical result. "But this equating of novelty with cause pushes the Court into a conundrum which it refuses to recognize. The more 'novel' a claimed constitutional right, the more unlikely a violation

of that claimed right undercuts the fundamental fairness of the trial." *Id.* at 21-22 (Rehnquist, J., dissenting).

The correction to the anomaly and the solution to the conundrum, we submit, is to always consider retroactivity with any *Reed* claim. Now that *Griffith v. Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987) has clearly separated retroactivity analysis on habeas from that on direct review, the *Reed* test must be deemed to refer to genuinely new constitutional principles which are retroactive *on habeas corpus*. Such new principles, we submit, are virtually nonexistent. See *Reed*, 468 U.S. at 26, n. 3 (Rehnquist, J., dissenting).

D. This Court has adopted two different methods for determining retroactivity of new rules.

The essence of a habeas petitioner's *Reed* claim is that the law has changed in an unexpected way and that he should not be "punished" for a lack of clairvoyance. But are the people of a state not entitled to make the same claim? The people's side of the unexpected change ledger is the issue of retroactivity.

In the present case, unlike *Reed*, the relation between retroactivity and cause for default is squarely before the Court. Cf. *Reed,* 468 U.S. at 20 (Powell, J., concurring). The relation was expressly considered by the court below and was discussed in the majority opinion and in one of the dissents. *Moore v. Kemp*, 824 F.2d 847, 853, n. 12 (11th Cir. 1987); *id.* at 870, n. 28 (Tjoflat, J. dissenting).

1. The rise of nonretroactivity: Linkletter-Stovall.

Under an earlier philosophy of jurisprudence, "retroactivity" was not an issue. Courts did not make law, it was thought, but only announced what had always been the law. 1 Blackstone, *supra* p. 3, at 69-70. Unconstitutional statutes were not "invalidated" by the decisions, they had never been true "statutes" at all. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

Along with judicial activism and the quasi-legislative promulgation of detailed rules of criminal procedure came the realization that full retroactivity was not constitutionally required. A series of cases in the mid-1960's established a three-part test for retroactivity: (a) the purpose of the rule; (b) the extent of reliance on previous practice; and (c) the effect on the system of justice of full retroactivity. *Linkletter v. Walker*, 381 U.S. 618, 636 (1965); *Johnson v. New Jersey*, 384 U.S. 719, 727 (1966); *Stovall v. Denno*, 388 U.S. 293, 297 (1967). The central concern of this approach seems to be whether retroactivity is needed to reverse the convictions of innocent people. If a rule has a powerful connection with the reliability of the truth-finding process and substantial numbers of innocent people have suffered false imprisonment, the reliance factor is swept away and the impact on the system must be borne as the cost of progress. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel established on collateral review); *Johnson*, at 384 U.S. at 727-28. Conversely, if the rule would exclude evidence in spite of its reliability in order to enforce a collateral policy, the social cost of full retroactivity may be prohibitive. *Linkletter*, 381 U.S. at 637-38. (*Mapp* exclusionary rule not retroactive on collateral review). In this practical cost-benefit analysis the status of review as direct or collateral had little weight. *Stovall*, 388 U.S. at 300-301.

2. The Harlan approach.

By the end of the decade, opposition had begun to form. In *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan took his stand that retroactivity must be rethought. *Id.* at 258 (Harlan, J., dissenting). Instead of focusing on the purpose of the rule and weighing the costs and benefits of retroactivity, Justice Harlan focused instead on the nature of the judicial process.

The first principle of jurisprudence is that courts decide cases according to the law. The most flagrant violation of this principle is the purely prospective "decision," one that is announced by the court but not applied to the parties before it. Because the power to announce constitutional rules flows solely from the duty to decide cases, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), such "pure" prospectivity is itself of doubtful constitutionality.

A more difficult question arises at the next step of the retroactivity ladder. Ernesto Miranda's conviction was reversed and his confession suppressed. *Miranda v. Arizona*, 384 U.S. 436, 491-92 (1966). Woodrow Whisman, whose similar case was on direct review at the same time, was denied the benefit of the *Miranda* rule. *Whisman v. Georgia*, 384 U.S. 895 (1966) (Douglas, J., dissenting); see *Johnson*, 384 U.S. at 734. How could the Georgia court be correct and the Arizona court in error when they reached

the same result under the same circumstances? It may well be socially efficient to so hold. The reversal of Miranda's conviction had little or nothing to do with the justice of his case,[3] but it was a necessary cost of insuring that arrestees would be made aware of their rights in the future. But is the difference in the treatment of Miranda and Whisman consistent with the Anglo-American system of law built on precedent? Justice Harlan thought not. *Desist*, 394 U.S. at 258-59; accord *Hankerson v. North Carolina*, 432 U.S. 233, 246-48 (1977) (Powell, J., concurring). If a legislature wishes to treat similarly situated people differently, it must at least have a rational basis for doing so. L. Tribe, *American Constitutional Law* § 16.2 (2d ed. 1988). How can this Court simply conduct a lottery?

The final step is the application of the Harlan theory to collateral review. If one accepts the analysis to this point, including the premise that the nature of the judicial process outweighs cost-benefit analysis, there are two principled answers. One could conclude that new rules must be applied on habeas as well, either on the Blackstone theory that law is discovered and not made, or on the theory that a habeas petition is not significantly distinguished from a direct appeal to apply a different rule. On the other hand, one could conclude both that a habeas petition is fundamentally different from an appeal, *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J. concurring and dissenting), and that the announcement of a truly new rule

3 The woman Miranda had raped had identified him *before* the now-famous interrogation. *Miranda*, 384 U.S. at 491. The justice of the outcome doubtless escaped her comprehension.

is an actual change in the law and not just a discovery. With the exception of rules which redress violations of rights "implicit in the concept of ordered liberty," *id.* at 693, new procedural rules should not be applied retroactively on habeas in the Harlan view.

E. If *Estelle v. Smith* is retroactive, a claim under it is necessarily not sufficiently novel to qualify under *Engle/Reed*.

In another case, *Dugger v. Adams*, 87-121, amicus has urged the Court to accept the Harlan view of retroactivity on habeas corpus as well as on direct review. That bridge need not be crossed in the present case, however, as both paths of retroactivity analysis lead to the same place. Under either view of retroactivity, the claim that *Estelle v. Smith* applies to this habeas petition is fundamentally inconsistent with the claim that respondent had cause for omitting it from his first petition.

1. Analysis Under Linkletter-Stovall

The *Linkletter-Stovall* analysis is still the method used by the Court for habeas cases to date. See *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam) (applying *Linkletter-Stovall* to *Batson v. Kentucky*, 476 U.S. 79 (1986)).

The first question normally addressed under the traditional approach is whether the rule in question is really a "new" rule at all or merely an application of an existing rule to different facts. Because respondent cannot have a "novelty" claim unless the rule is new, we will defer this question to the end of the discussion.

Assuming the rule to be new, retroactivity depends on the three *Stovall* factors. See p. 21, *supra*. Examining the purpose of the *Estelle v. Smith* rule, we travel a well-worn path. The purpose of rules protecting the right to counsel during interrogation and protecting the privilege against self-incrimination is one of the most thoroughly discussed areas of retroactivity law. While there is some tangential relation between these rules and the reliability of the fact-finding process, the "purpose" prong of this test is invariably resolved against retroactivity. See *Tehan v. Shott*, 382 U.S. 406, 414-16 (1966) (comment on failure to testify); *Johnson v. New Jersey*, 384 U.S. 719, 729-30 (1966) (*Miranda* and *Escobedo*); *Stovall v. Denno*, 388 U.S. at 297-99 (1967) (counsel at identification); *Solem v. Stumes*, 465 U.S. 638, 643-645 (1984) (requirement that suspect initiate any conversation after invocation of *Miranda* rights).

The second and third *Stovall* factors are significant only when the "purpose" question is not clearly resolved one way or the other. *Desist v. United States*, 394 U.S. 244, 251-252 (1969). The long line of authorities from *Tehan* to *Solem* would seem to resolve the question beyond doubt, but even if they do not, the effect on the system of justice weighs heavily against retroactivity. It is apparent from this Court's own cases that the practice of psychiatric interviews without counsel has been extensive. See *Estelle v. Smith*, 451 U.S. 454 (1981); *Satterwhite v. Texas*, 56 U.S.L.W. 4470 (May 31, 1988); see also *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981).

The second *Stovall* factor looks "primarily to whether law enforcement authorities and state courts have justifiably relied on a prior rule of law said to be different from that announced by the decision whose retroactivity is in issue." *Solem*, 465 U.S. at 645-46. "At just what point of predict-

ability *local authorities should be expected to anticipate* a future decision has been unclear, however." *Id.* at 646 (italics added). The second factor is thus closely connected with the question of whether the rule is really new at all.

With the purpose and impact factors weighing heavily against retroactivity, a habeas petitioner seeking to apply *Estelle v. Smith* must establish either (a) that *Smith* is not a new rule at all, so that retroactivity analysis does not apply; or (b) that *Smith* was sufficiently predictable that local authorities and state courts should have anticipated it, making reliance on any prior practice unjustified. In a *successive* habeas petition, however, either of the above arguments collides head on with the contention that the novelty of the argument justifies its omission from the prior habeas petition. A decision is eligible for nonretroactivity if it establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971) (citation omitted).

Estelle v. Smith did not overrule any clear past precedents. It established a new principle of law, therefore, only if it was a case of first impression whose resolution was not clearly foreshadowed.

The predecessor of the court below[4] examined the retroactivity of *Estelle v. Smith* in *Battie v. Estelle*, 655 F.2d

4 That is, the Fifth Circuit before its division into the present Fifth and Eleventh Circuits.

692, 696-99 (5th Cir. 1987). In deciding that *Smith* did not establish a new principle of law, the Fifth Circuit noted the *Smith* court's reliance on *In re Gault*, 387 U.S. 1 (1967), a case decided eleven years before respondent's first federal petition. The *Smith* holding is squarely premised on *Gault*, quoting the statement "the availability of the [Fifth Amendment] privilege *does not turn upon the type of proceeding in which it is invoked*, but upon the nature of the statement or admission and the *exposure* which it invites." *Smith*, 451 U.S. at 462 (italics added). A better example of clear foreshadowing can scarcely be imagined.

The Fifth Circuit was entirely correct in *Battie* that *Smith* was fully retroactive because it did not establish a new principle of law. *Smith* was clearly foreshadowed by *Gault* and by *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). This very same foreshadowing conclusively establishes that Moore's counsel *did* have the tools to construct his *Smith* claim at the time of the first petition.

The majority of the court below appears to have taken the position that Moore is excused from not raising the issue in his first petition merely because the claim was not a certain winner at the time, citing such factors of uncertainty as the plurality status of the *Gardner* opinion, *Moore v. Kemp*, 824 F.2d 847, 852 (11th Cir. 1987), and the differences between Georgia and Texas sentencing procedures, *Moore*, 824 F.2d at 853-54. This Court has made it clear, however, that counsel's opinion that a claim has little chance for success does not constitute cause for a default. *Smith v. Murray*, 477 U.S. 527 (1986). The question is whether counsel has the tools to construct the claim. *Gault* plus *Gardner* were more than sufficient tools for Moore's counsel to construct an *Estelle v. Smith* claim in

November of 1978. Battie's counsel had done so three months earlier. *Battie v. Estelle*, 655 F.2d at 696.

2. Analysis Under the Harlan-Powell Approach.

Under the Harlan-Powell approach, the analysis is considerably simpler. Petitions for writs of habeas corpus should be judged "according to the law in effect when [the] conviction became final." *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J. concurring and dissenting). Exceptions are made only for decisions which preclude punishment for the conduct in question altogether, *id.* at 692, and "for claims of nonobservance of those procedures that . . . 'are implicit in the concept of ordered liberty,' " *id.* at 693, quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Neither of the exceptions applies here. Murder is still a crime, and death is still a valid punishment. The procedures of which respondent complains cannot be said to be so fundamentally unfair that the *Estelle v. Smith* rule is essential to the substance of fair hearing. The law to be applied to this petition, then, is the law in effect when this court denied certiorari in 1976. See *Moore v. Georgia*, 428 U.S. 910.

Can it seriously be contended that the *Estelle v. Smith* claim was not reasonably available to counsel in 1978 while at the same time contending that the conviction was reversible on that basis in 1976? No. The two propositions are logically contrary, i.e. one or the other or both must be false.

Respondent cannot possibly be entitled to a writ of habeas corpus. In the process of showing that *Estelle v. Smith* is retroactive he must necessarily negate cause for his own default.

F. There has been no fundamental miscarriage of justice.

This Court has previously noted that there may be a "fundamental miscarriage of justice" exception to *Sykes*. *Engle*, 456 U.S. at 135. For guilt phase error, this means actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). This concept does not easily translate to the penalty phase. In one case, the test applied was whether the error "serve[d] to pervert the jury's deliberations." *Smith v. Murray*, 477 U.S. 527, 538 (1986). Respondent's claim here is virtually identical to Smith's. Both cases involved un-*Mirandized* interviews with court-appointed psychiatrists. No reason appears for a different conclusion.

Conclusion

The decision of the Eleventh Circuit should be reversed and the petition for writ of habeas corpus denied.

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Respectfully submitted,

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